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Cw. Manir.

105

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT & BANKRUPTCY COURT

OF

MAURITIUS.

ARRÊTS

DE

LA COUR SUPRÊME, DE LA COUR DE VICE-AMIRAUTÉ

ET DE

LA COUR DES FAILLITES

DE

L'ILE MAURICE.

1866.

VOLUME SIXTH.

EDITED BY A. PISTON,

ATTORNEY AT LAW.

MAURITIUS.

L. CHANNELL'S STEAM PRINTING ESTABLISHMENT, POUDRIÈRE STREET.

1866.

SUPREME COURT OF MAURITIUS.

His Honor N. G. BESTEL, Acting Chief Judge.
The Honorable G. B. COLIN, Acting First Puisne Judge,
The Honorable L. ARNAUD, Acting Second Puisne Judge.

The Honorable S. J. DOUGLAS, Acting Procureur and Advocate General.
J. L. COLIN, Esq., Acting Substitute Procureur and Advocate General.

VICTOR ESNOUF, Esq., Master.
J. A. ROBERTSON, Esq., Substitute Master.
F. HERCHENRODER, Esq., Registrar.
L. ISNARD, Assistant Registrar.

VICE-ADMIRALTY COURT.

The Honorable N. G. BESTEL, Judge Surrogate.
The Honorable S. J. DOUGLAS, Queen's Advocate.
J. H. SLADE, Esq., Registrar.
J. BOUCHET, Queen's Proctor.
G. A. RITTER, Marshall.

COURT OF BANKRUPTCY.

JUDGES :—THE JUDGES OF THE SUPREME COURT.
J. HERCHENRODER, Esq., OfficialAssignee.

COUNSEL (actually practising).

Kœnig, Hon. H.	1820	Leclézio, E. J.	1858	Didier St-Amand, E.	1864
Dupont, E.	1827	Martin Moncamp, P. G.	1861	Esnouf, A.	1865
Leclézio, E.	1828	Rouillard, L.	1861	Jenkins, T. L.	1865
Lalouette. A. A.	1832	Bolton, W. D.	1861	Florent, E.	1865
Bouchet, E.	1837	Wilson, H.	1863	Cox, L.	1866
Campbell, C. M.	1841	Chastellier, P. L.	1864	Piston, M. E.	1866
Colin, J. L.	1850	Delafaye, V.	1864	A. E. Lapeyre	1866
Legall, A.	1855	Guibert, G.	1864	H. E. Desmarais	1866
Naz, Hon. V.	1857	Newton, W.	1864		
Bazire, E.	1858	Lepoigneur, I.	1864		

ATTORNIES (actually practising).

Adler, L.	1839	Duvivier, Ed.	1853	Pitot, A.	1863
Pastor, E.	1840	Robert, F.	1857	Bétuel, A.	1863
Lalandelle, G.	1842	Ackroyd, J.	1859	Boullé, V.	1863
Hewetson, W.	1846	Desperles, L.	1859	Rodesse, L. C.	1864
Laurent, E.	1846	Herchenroder, T.	1860	Delainé, V.	1864
Ducray, E.	1848	Piston, A.	1860	Bertin, H.	1864
Hitié, U.	1850	Laval, V.	1860	Ritter, G. A.	1864
Piguéguy, J.	1850	Chazal, P. E. de	1860	Perrot, A.	1864
Boullé, E.	1850	St-Perne, E. P.	1860	Rohan, A.	1864
Pastor, H.	1850	Tessier, G.	1860	Astruc, A.	1864
Pragassa, V.	1851	Victor, F.	1860	Macquet, E.	1865
Colin, A. J.	1851	Mallet, F.	1861	Gilot, F.	1865
Guibert, J.	1853	Ducray, V. G.	1861	Halais, J.	1865
Finniss, W.	1853	Gautray, C.	1861	Sauzier, M.	1866
Slade, J.	1853	Sicard, N.	1862	Sauzier, E.	1866
Bouchet, J.	1853	Simonet, F.	1863		

[L.L]

Cw. Manir.

105

JUDGMENTS OF THE SUPREME AND OTHER COURTS

OF

MAURITIUS,

EDITED

BY A. PISTON, ATTORNEY AT LAW.

1866.

COURT OF BANKRUPTCY.

—

CESSION DE BIENS,—CONCORDAT,—PRÉFÉRENCE ACCORDÉE A L'UN DES CRÉANCIERS,— CONCORDAT ACCEPTÉ PAR LA MAJORITÉ DES CRÉANCIERS ET REJETÉ PAR LA COUR.

Un projet de Concordat conférant préférence à l'un des créanciers sur les autres, sans avantage équivalent pour ces derniers, a été rejeté par la Cour à la demande de la minorité, bien qu'il fût accepté par la majorité légale des créanciers.

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CESSIO BONORUM, — ARRANGEMENT, — UNDUE PREFERENCE, — ARRANGEMENT ACCEPTED BY THE MAJORITY OF CREDITORS AND ANNULLED BY THE COURT.

Where a proposed Arrangement stipulated inter alia *that a mortgage over the whole subjects should be given in favor of one of the personal creditors for his debt of* $150,000, *without what was deemed an adequate advantage, the Court, on the opposition of a minority of the creditors, refused to confirm the Arrangement as a reasonable one, although there was more than three-fourths of the creditors in favor of accepting the Arrangement.*

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In re; Cessio Bonorum HEIRS LANOUGARÈDE.

Before His Honor the CHIEF JUDGE.

The Hon. H. KŒNIG, of Counsel for Petitioners;
W. FINNISS, attorney for same;
The Hon. V. NAZ, } of Counsel for accepting
J. L. COLIN, } creditors;
H. BERTIN, } Attorneys for same;
E. DUVIVIER, }
A. LEGALL, } of Counsel for contesting cre
E J. LECLÉZIO, } ditors;
E. DUCRAY, } Attorneys for same.
G. RITTER, }

[1*st February* 1866.]

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THE COURT:—In this case the only question for decision, at present, is whether the Arrangement proposed by the Petitioners: the heirs of the late Mr. Lanougarède, and accepted by more than the statutory majority of creditors, ought or ought not to be confirmed by the Court.

The discussion has been of more than usual interest from the large amount of the pecuniary claims at stake and the somewhat peculiar circumstances in which the question comes before the Court.—The late Mr. Pierre Victor Lanougarède died in Port Louis on the 1st July 1865. His property consisted chiefly of a large number of sugar estates and appurtenances and of many valuable immoveable subjects in the town of Port Louis. The present applicants, who are his heirs, accepted the succession purely and simply, thereby rendering themselves, in terms of law, liable for all his debts. Mr. Lanougarède had been married. His wife predeceased him by about a year. They had been married in community, and after the wife's death, the common property, including the sugar estates and houses in Port Louis, was exposed for sale with the view of having a division made between the husband and the creditors and heirs of the community. At the sale, the whole subjects were bought by Mr. Lanougarède, and it is one of the grounds of complaint of the objecting minority, in the present case, that the heirs, after the death of Mr. Lanougarède, have gone on with the proceeding before the notary *en partage* of the community, whereby

it is alleged that undue preferences, by way of mortgage, have been given to various parties, to the prejudice of the general body of the creditors of the insolvents. This question will be examined more particularly in the sequel.

Some time after the death of Mr. Lanougarède, the heirs began to encounter serious embarassments in the management of the Estate, from the increasing pressure of the numerous debts affecting it. It would appear that, as far back as September last, they were unable to meet the bills then falling due, and many of them lay over unretired. On the 16th November they concluded an arrangement with the Ceylon Company Limited and the Oriental Bank, whereby advances were to be made on the conditions therein mentioned for carrying on the Estates for 4 or 5 years. The arrangement among other things stipulated for a mortgage in favor of the Bank for the sum of $150,000, something under the amount alleged to be due to it on the bills and on other titles at that date partly at maturity and partly not. This stipulation is now maintained to be an undue preference given to a creditor *chirographaire*—or a personal creditor,—to the prejudice of all the other personal creditors, and is the main ground on which the proposed Arrangement has been so keenly opposed by a consirable body of the creditors.

In less than a week after the Arrangement was concluded, viz: on the 21st November last, the heirs called their creditors together and submitted the state of their affairs to the meeting, and for the first time informed their creditors of the agreement with the Bank and the Ceylon Company.

Four Commissioners were appointed by the creditors to take a general mortgage over the whole property for the benefit of the creditors and to prepare a report of the state of the whole succession of Mr. Lanougarède. Their report, dated 31st November, was laid before the creditors at another meeting held on that day.

The present applications for Cessio Bonorum were presented by the heirs on the 12th December last. In their Balance Sheets, the position of the Estate, as at the 16th of the preceding month of November, is stated as follows, in accordance with the reports of the Commissioners already alluded to:

The Sugar Estates are valued at.	$ 948,500.	
Burdened with the mortgages amounting to	531.289.33	
Leaving a difference of...		$ 417,210.67
The houses in Port-Louis are estimated at	169,000.	
With mortgages amounting to	87,211.50	
Leaving a balance of		81,789.50

Other assets are stated, including the personal estates of the Petitioners, bringing up the amount of the "Actif," deducting the mortgages, to the sum of $357,269,60; but this includes a sum of no less than $149,659.31 of doubtful claims, which the Commissioners had discarded altogether from their calculations, as worthless.

The debts of the estate are given as follows:

Wages due	$ 32,349.40
Accounts due	40,778.54
Bills in circulation	519,628.00
Interest of mortgages in arrear ...	18,662.82

Throwing out of view the doubtful debts due to the estate, which the Commissioners had set aside as valueless, but including the personal effects of the heirs, the result agreeing with the estimation of the Commissioners is that, on the whole, an apparent balance of assets over debts appears of $ 129,538.53.

In this state of matters, the proposed Arrangement or "Concordat," which has given rise to so much discussion, was submitted to the Court.

In that document the Petitioners set forth their inability to meet their debts from the deficiency of the late crop; that an immediate realization of the succession is impossible, and would be in any view disadvantageous to the parties interested; that they had entered into the arrangement with the Ceylon Company Limited, and the Oriental Bank, on the 14th November 1865, already alluded to, to secure the means of keeping the estates in a good state of cultivation; that they had granted the general mortgages as wished by the creditors, dated 1st December last, in favor of 4 Commissioners on behalf of all their personal creditors, (chirographaires;) that the Commissioners had suggested several modifications of the proposed arrangements, and among others, specially, an immediate sale of certain of the immoveable subjects of the estate. On this recital, the Petitioners ask to be allowed a delay of 4 years for payment of the capital of their debts of every description; the debts to bear interest at 9 per cent, payable quarterly so far as relates to the mortgage or priviledged creditors, and as to the personal claims, the interest to be payable one year after the expiry of the 4 years to be accorded to the Petitioners. The capital to be paid at the 4 terms of the 15th December 1866, 1867, 1868 and 1869, the terms of payment to be increased if the sums drawn from realizing the estate and from the produce of the lands shall warrant such increase. It proposed that the estate shall be managed by Mr. Bazire, a son of one of the Petitioners, with the assistance of three Commissioners named by the creditors with full powers of sale, &c., &c. The prices of the subjects sold to be paid in money or with the obligations of the estate; that a special Inspector be appointed to excute the instructions to be given for the management of the estate; that the moveable debts due to the estate shall be realized as speedily and completely as possible; that the houses in town and three of the sugar estates therein named shall be sold as soon as may be, the price to be payable in the moveable obligations due by

the estates; that a mortgage be granted by the heirs over their own personal property, but not to be operated upon till the estates of the late Mr. Lanougarède are exhausted; that in case of the Arrangement not being unanimously accepted, it shall be submitted to this Supreme Court for confirmation in terms of law.

This proposed Arrangement has not been accepted by all the personal creditors, *i. e.* by those creditors who are most interested in the matter, the mortgaged creditors not being affected by any such agreement. A very strong opposition has been manifested from the first mooting of the matter, and a rigid scrutiny of the claims and titles of the supporters of the Arrangement has been insisted on and gone through, at the instance of the opposing creditors. The result is that, without computing various claims which might have admitted of some dispute, there is much more than a clear majority of three fourths in number and value of the personal creditors, who accepted the Arrangement.

The numbers stand thus: for the Arrangement, 52 creditors with debts in the aggregate of $349,114; against the arrangement, 11 creditors with debts amounting to $27,820.

So standing the votes of the creditors, the next, and as we have already said, the only other inquiry in the matter is whether the proposed Arrangement ought to be approved of and confirmed by the Court. The local law on the matter is contained in § 35 of the Insolvency Ordinance, No. 23 of 1856, which runs in these terms:

"Any agreement made pending or after the *Cessio Bonorum* between the debtor and three fourths in number and value of his creditors, shall, subject to the approval of the Court, be binding upon all his creditors. If the Court shall deem such agreement reasonable, it shall order the same to be filed and entered of *Record* in the Registry and shall further order that the *Cessio Bonorum* be discontinued or annulled, as the case may be. Any creditor shall be entitled to an office copy of the said agreement upon applying to the Registry and paying for the same."

Two objections, as already mentioned, are brought forward by the resisting creditors. The first is grounded on the partition of the community existing between the late Mr. and Mrs. Lanougarède, the second on the preference, by way of mortgage, for the sum of $150,000, which has been accorded by the heirs, to the Oriental Bank, over the other "chirographaires" or personal creditors.

Now, as to the first objection, the Court is unable to perceive how the proceedings for the division or "partage" of the property of the community of the late Mr. Lanougarède and his wife can affect the decision of the present question. The proceedings were begun in his own life time, the rights of the creditor of the community extended over the whole mass of the property, of which half belonged to Mrs. Lanougarède.

The "partage" was completed on the 26th October last and registered on the 4th of the following month of November, while the petitions for *Cessio Bonorum*, now before the Court, are dated and filed on the 12th December last. But, moreover, if there is anything wrong in the "partage" and the proceedings on which it is based, the Supreme Court of the Colony is the only place where the rights of parties can be vindicated, for a single Judge sitting as Commissioner in a case of Insolvency has no competency or power to interfere with those proceedings. The remedy, if a remedy is, open to the parties who think themselves aggrieved, must be sought for elsewhere. This objection, therefore, to the sanctionning of the Arrangement proposed cannot be sustained.

The Court will now deal with the second objection. The opposing creditors maintain that the Arrangement, homologating as it does the agreement between the Petitioners and the Ceylon Company and the Oriental Bank, of date the 16th November last, ought not to be approved by the Court. That agreement, it is said, operates a most unfair and undue advantage in favor of one of the personal creditors, viz: the Bank, to the prejudice of all the personal creditors.

Now, what are the facts here? It appears that the heirs themselves, being unable to meet the engagements of the succession, after asking assistance as they say, in other quarters, applied to the Ceylon Company Limited for advances. That Company told them that it could only assist them with the co-operation of the Oriental Bank, and that the price of that co-operation over and above the Interest and Commission on the advances, must be a mortgage in favor of the latter for the sum of $150,000—about the amount of bills and other obligations of the late Mr. Lanougarède or his heirs, which the Bank held without any security. The heirs agreed to accept those terms and the Arrangement was embodied in a notarial deed, bearing the date of 16th November 1865.

That deed has been thoroughly examined in the course of the argument. It is necessary that its various provisions should be distinctly borne in mind. It proceeds on and embodies a previous *sousseing privé*, dated 14th November, entitled *conventions* between the Oriental Bank, the Ceylon Company and the heirs. In those *conventions* it is set forth that the Oriental Bank is a creditor of the late Mr. Lanougarède to the extent of $156,000, *pour divers billets, titres, et valeurs dont partie échus et partie à échoir.* That the heirs were unable to pay to the Bank the bills actually due, that the Bank had agreed to make Arrangements with the Ceylon Company, to obtain the necessary advances for the estates, but under the express condition that the debt actually due to the Bank should be secured by mortgage on the estates of the succession, or by the assignment of mortgages belonging to the succession. That the Ceylon Company had accepted that condition and, at the request of the Bank, had agreed to make the necessary advances to the heirs and to open the three credits after mentioned, on the footing that the Bank should negociate,

to the extent of the advances, the bills of the heirs endorsed by the Ceylon Company. The first credit was to be for $350,000 to finish the crop of 1865 and to make the crop of 1866. The second was to be for $300,000 for the crop 1867, and the third for $300,000 for the crop of 1868. The Company was to have the control of all the sums advanced and of the management of the Estates and was to furnish directly the food and supplies, and to pay the interests on the mortgages and the wages of the laborers, and to have the right of visiting the Estates and examining the Books when it pleased. Bills were to be granted by the heirs, for every advance, at such currency as the Company might fix, to be renewed when it pleased, and to make only one title with the deed itself and the "hypothèque" which was to be given for the advances.

The whole sugar remaining to be made of crop 1865, and the sugars of crop 1866, 1867, and 1868, on all the eleven estates were pledged for the advances, and were to be sold by the Company who were to account for the price, deducting the brokerage and a commission of 3 o|o. The sugars pledged were to be valued, for the first year, at 12 millions, for the second and third years at 10 millions, all as a maximum; but whether the actual produce reached those figures or not, the commission on the sale was to be drawn on those quantities. An account current was to be stated between the parties and to bear interest at 10 o|o, any balance due to the estate by the Company was to be paid on 1st July of each year, while any balance due to the Company was to bear interest at the rate of 10 o|o per annum till payment, and to be taken out of the subsequent credits. If in the event of unforeseen circumstances, or of bad management of the estates, it should be perilous for the Company to continue the agency, it stipulated for the right to discontinue the advances at the end of the first year. The heirs were bound to give a mortgage in security to the Company to the amount of $ 350,000 over the whole immoveable property of the succession, to take rank after the sum of $380,000 of existing "hypothèques." The persons who had an interest in some of the estates as co-owners were to intervene to the act of hypothecation, but the interest of the heirs Lanougarède in the estates were to be burdened with the whole of the above amount. In farther guarantee of the advance to be made by the Company, certain debts belonging to the heirs Lanougarède, and secured over the estates *Marc d'Albert*, *St. Julien*, *Belle Rive* and *Beaux Songes*, a claim of $45,000 odd on Mr. and Mrs. Laurent, a claim of $9,800 odd on Mr. and Mrs. Latour St. Ygest. and a claim of $ 15,000 odd on Mr. Pilot and Messrs. Lionnet brothers, were to be assigned to the Company.

After the mortgages and conveyances in guarantee above mentioned in favor of the Ceylon Company, it was stipulated that a mortgage should be granted over the estates of the succession Lanougarède and an assignment in guarantee of the above claims in favor of the Oriental Bank for the amount of $ 150,000 taking rank immediately after the mortgage of the Ceylon Company.

[redacted] agreement was not to be binding on the Company until the privileged and mortgage creditors had consented not to impede the working of the Arrangement.

Such are the covenants of the "conventions" embodied and forming the substance of the notarial deed of 16th November 1865. In that latter document it is further provided that the "attributions" in the "partage" of the community of the late Mr. and Mrs. Lanougarède shall take precedence of or *prime* the mortgages of the Ceylon Company and the Oriental Bank.

It is proper to mention that, on the suggestion apparently of the Commissioners appointed by the creditors at their first meeting, some modifications by no means unimportant, were subsequently accepted by the Bank and the Ceylon Company. It was agreed that the mortgages should not affect the subjects in the town of Port Louis, and the Bank offered to abandon its mortgage, if the funds for carrying on the estates were procured from any other quarter.

As we have already seen, the objection of the dissentient creditors, in this part of their argument, turns mainly on the change of the position of the Oriental Bank effected by this agreement. At the date of this document the Bank was simply one of the unsecured personal creditors, or *chirographaires*, of the succession Lanougarède. By the deed it is intended to take the Bank out of that category and to place it alone of the *chirographaires* among the secured creditors or *hypothécaires*. For this concession the heirs are to have the advances made to them, on the various conditions stipulated with the Ceylon Company.

Is this Arrangement as a whole, such a reasonable one as the Court can sanction?

In the first place it appears to the Court that some of the enactments of the Insolvency Ordinance of 1856 are not immaterial in the decision of such a question. By § 14 it is declared that: "All mortgages and privileges over any portion "of the real estate of a petitioner for a *cessio* "*bonorum*, inscribed within one month previous "to the date of the filing of his petition, shall "*prima facie* be reputed null and void as against "the mass of the creditors of the petitioner, sub-"ject to the right of the creditor having ac-"quired any such mortgage or privilege to prove "that the same was granted *bonâ fide* for a va-"luable consideration and without due prefer-"ence, and not as a security for any pre-exis-"ing debt."

So again the immediately following article § 15 provides that: "if any debtor, not being a "trader, being in insolvent circumstances, shall "voluntarily convey, assign, transfer, charge, "deliver or make over any portion of his real or "personal Estate or effects to any creditor or "creditors or to any person in trust for or for "the benefit of any creditor or creditors, with "intent to give any undue preference to such "creditor or creditors, every such conveyance "assignment, transfer, charge, delivery, and "making over shall be deemed and declared to be "fraudulent and void as against the assignees of "such debtor appointed under this Ordinance."

In the present case one month had not run between the inscription of the deed in question and the presenting of the Petitions for *Cessio Bonorum*. It is true that the Court has not to try directly the issue which might be raised under either the one section or the other. It has not to decide, in so many words, whether the Mortgage in favor of the Bank falls or does not fall under §45, or is not an undue preference under §46; but as it is conceded, on all hands, that if this Arrangement, embodying the transaction with the Bank and the Ceylon Company, is now approved of, the mortgage to the Bank will be confirmed, it is impossible for the Court to throw out of view what the law has so emphatically laid down in the sections of the Ordinance just referred to. A Commissioner in the Court of Insolvency, with such a law before him, will not readily, and in the face of a resisting minority, confirm any Arrangment which gives effect to a mortgage not inscribed a full month before the presenting of the Petition for *Cessio*.

It was argued, for the Bank, that in fact "valuable consideration" was given for the mortgage and that it was not really for a "pre-existing debt;" the Court is not able to follow that argument.

Taking the latter point of "pre-existing" debt first, it will be remembered that the mortgage was given for the sum or about the sum then *actually owing to the Bank*. As to *consideration* for the mortgage it is plain that, if we look to the advances which had been made to the late Mr. Lanougarède and his heirs by the Bank, that establishment had given no other or better "consideration" than the other personal creditors, who are therefore entitled to say that it is unreasonable that the Bank should be placed in a more favorable position than they are. If it be maintained that the "consideration" for the mortgage was the advances to be made by the Ceylon Company, or say the Oriental Bank as was contended,—for it is not necessary to go into the relations of those two Companies to each other or to the heirs in the matters in question,—then the objecting creditors say that the most ample consideration for those advances was given, in the exacting conditions of the deed, for the security and repayment of the loans. At all events they contended that to insist besides on a *bonus*, as it was called, of £150,000, or at least of a preference over the other creditors to that extent, is not fair and reasonable.

It is said by the Bank that even with the preference given by the mortgage, it will not have improved its position very materially, as there are already before it mortgages to the amount of £380,000. This may be all very true, but in a discussion with the other personal creditors, as to the reasonableness of the proposed Arrangement, such an argument can have but little weight. The question here is between the Bank and the dissentient personal creditors. There is no question with the mortgage creditors, and in truth if we were to assume the probability of there being but little over, after satisfying the mortgage creditors, the personal creditors would have the great reason to complain of any preference being established in favor of one of themselves to the prejudice of the others. Again it was argued that the Bank, in endeavouring to save itself by taking a mortgage, did no more than creditors are in the habit of doing when they are called upon to make further advances to their debtors. But this is shifting the issue now before the Court. The Bank naturally did what it could to avoid the risk of loss which was impending over it; but the Court has not to study the interests of a particular creditor. On the contrary it has to say whether, looking at the interests of the whole body of unsecured creditors, the Arrangement now proposed, of which the mortgage to the Bank is a most important part, is a just and reasonable one, and proper to be confirmed.

It was moreover strongly urged, in support of the confirmation of the Arrangement, that the Court should be guided in its opinion by the fact that there is a great preponderance of creditors—both in number and value—in favour of its adoption; that this was really a financial question of which men of ordinary business were the best judges, or that, at least, the majority knew quite well what they were about, and should not be interfered with in the arrangement which they thought fit to make, regarding their own property. Up to a certain point the Court readily admits the force of this argument. It must always be a consideration of great weight in the mind of a Judge when he is called upon to decide questions like the present, that there is a large majority of the creditors in favor of the Arrangement brought under his notice. But such a majority is not conclusive in the matter, otherwise the law would have said so at once; but the Ordinance says nothing of the kind; on the contrary, as we have already seen, it requires that the suggested Arrangement, having passed the ordeal and the scrutiny of the creditors and been accepted by a certain proportion in number and value, must be confirmed by the Court, as a reasonable proposal.

There are two things obviously required by the law: firstly, we must have the majority at least of ¾ of the whole personal creditors in number representing at least ¾ of the gross amount of the claims of that class of creditors; and secondly, a finding by the Judge that the Arrangement is a reasonable one. The existence of a large majority in favor of a particular Arrangement will not be thrown out of view by the Judge, but if he were to accept that, *per se*, as sufficient, he would simply abdicate the functions which the law has imposed upon him, and fail in the performance of his public duty. Majorities have no privilege of being always reasonable or in the right, in Courts of Insolvency or elsewhere, and the legislature has established the intervention of the Court plainly for the protection of the general interests of all the creditors, of the minority as well as of the majority. A Judge will not scan too nicely the details of an Arrangement if, upon the whole, he is satisfied that it is fair and reasonable. For example, in the present case, the Ceylon Company, while the heirs are bound for the 4 or 5 years during which it is proposed that the agreement should last, has the right, in certain circumstances, of withdrawing from the contract at the end

of the first year. Again the Court observes that the Commissioners appointed by the creditors to investigate the state of the affairs of the succession, gave it as their opinion that the loan contracted with the Ceylon Company was too large. If the Court had been satisfied that the Arrangement as a whole was not unreasonable, it would not probably have considered it necessary to go into these or other minor considerations. As to the first point, the Court would have held that the clause might safely enough be allowed to stand, as the Bank, before withdrawing, at the close of the first twelve months, would have been bound rigourously to justify the necessity which it alleged for such conduct, and as to the second, the silence of the Counsel, on the matter, would have led the Court to conclude that if the Arrangement was generally proper and admissible the amount of the funds to be supplied by the Ceylon Company was not excessive. But the difficulty of the Court, as already explained, is founded on deeper and broader considerations.

For the reasons above stated the Court does not find that the Arrangement proposed is a reasonable one and must therefore decline to approve and confirm it.

SUPREME COURT.

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ACTION EN DÉGUERPISSEMENT.—CONCESSIONS.—PAS GÉOMÉTRIQUES.—RÉSERVES DU BORD DE MER.—DROITS DU GOUVERNEMENT. — PRESCRIPTION DE 30 ANS. — COMPÉTENCE DE LA COUR SUPRÊME. – ARRÊTÉ 144 DU CODE DECAEN.—ORD. 193 DU CODE DELALEU.

Un terrain concédé avant la promulgation de l'Arrêté 144 *du Code Decaen sur les Pas Géométriques était stipulé aborné, sur un de ses côtés, par une rivière et, d'un point à un autre, par "les réserves du bord de mer." Une portion du rivage du terrain concédé, située entre l'embouchure de la rivière et les points de la côte indiqués dans l'acte de concession, n'était point mentionnée dans cet acte; la Cour a décidé que les Réserves ou Pas Géométriques devaient être étendus à la partie du rivage non décrite dans l'acte de concession, et que cette portion de la côte devait être considérée aujourd'hui comme propriété du Gouvernement.*

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ACTION IN TRESPASS.—"CONCESSIONS."—GRANTS OF LAND.—"PAS GÉOMÉTRIQUES."—GOVERNMENT RESERVE ON THE SEA SHORE.—PRESCRIPTION OF 30 YEARS.—JURISDICTION OF THE SUPREME COURT.—"ARRÊTÉ" 144 OF THE CODE DECAEN.—ORD. 193 OF THE CODE DELALEU.

A plot of ground, granted by Government before the promulgation of the "Arrêté" 144 of the Code Decaen on the "Pas Géométriques," was stipulated bounded, on one side, by a river and, from one place to another, by the Sea shore "réserves." A portion of the Sea shore of the land conceded, being between the mouth of the river and the points on the coast indicated in the deed of concession, was not mentioned in that deed; the Court has decided that the Sea shore "réserves" or "Pas Géométriques" ought to be extended to that part of the coast not mentioned in the deed of concession and that such portion of the Sea shore is Government property.

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DUVAL,—Plaintiff,

versus

BRUE,—Defendant.

IN THE CAUSE:

The Colonial Government of Mauritius.

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Before:

His Honor the CHIEF JUDGE *and*
The Honorable Mr. JUSTICE COLIN.

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J. L. COLIN,—of Counsel for Plaintiff;
J. PIGNÉGUY,—Plaintiff's Attorney;
E. J. LECLÉZIO,—of Counsel for Defendant;
J. GUIBERT,—Defendant's Attorney;
S. J. DOUGLAS,—of Counsel for Government;
J. BOUCHET,—Attorney for same.

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[12*th January* 1866.]

In this case the Plaintiff, Duval, averring that he is the owner of a plot of ground of twenty five acres in extent, situate at *La Marre aux Lubines*, in the District of Flacq, and that the Defendant is the owner of the Sugar Estate *Providence*, complained that the Defendant had trespassed upon his, the Plaintiff's property, and built a store and appurtenances on land belonging to him, the Plaintiff, and also dug into a certain marsh belonging to him, the Plaintiff, and asked judgment of this Court to the effect that the said store and appurtenances, built by the Defendant as aforesaid, be removed at the expense of the Defendant, within a delay to be fixed by the Court, and also to the effect that the Defendant do pay, as damages, for the grievances complained of, the sum of £1000.

The Defendant, after a Demurrer which was not insisted on, pleaded over and, in his Plea, denied the Plaintiff's averments, and that he was not guilty of any trespass; there was a further plea to the Jurisdiction of the Court, which in the argument was not pressed; and in a further Plea, which was subsequently added, the Defendant denied the Plaintiff's possession, and set forth that he, the Defendant, had, by 30 years possession by himself or assignors, held the plot of ground in question.

After a good deal of evidence had been entered, mainly to determine which of the two con-

esting parties, if either, could support his title upon the 30 year's or *longissima præscriptio*, none other being set up in the pleadings, the parties were heard on the merits of the case, when, from the documents adduced, the Court thought that another party, very materially interested in the issue, the party who in fact might possibly or even probably be the owner of the plot of ground in question, was not before the Court, and an interlocutory decree was accordingly given to the effect that the Colonial Government of Mauritius should be made a party to the proceedings.

The Colonial Government, having received notice of the Decree, did appear, and claimed the particular plot of ground in question as forming part of the property of Government, being included within the "pas géométriques" in that portion of the beach which Government reserves to itself for Colonial or Imperial purposes. The issue therefore which, from the first, involved the question of knowing whether the small plot of ground, on which Mr. Brue had built a store and appurtenances, belonged to the Plaintiff or Defendant, was in reality now charged, and the question arose whether that plot of ground was Government property or the property of either of the claimants.

There was no question as to Duval being the owner of the twenty-five acres of land, which he held on Brue, the owner of the *Providence* Estate; the whole contention turning upon the half acre of land on which Brue's store now stands.

At the request of parties some fresh evidence was adduced, and S. J. DOUGLAS, for the Government said: I contend that the *locus in quo* belongs to Government; the Defendant Brue is a lessee under the Crown, the land forms part of the "Pas géométriques" and was "inaliénable," and was not alienated. The Plaintiff, under the concession which is the basis of his title, can only claim 130 acres and 86 perches; and yet, if his pretentions are correct, and if the line of the sea coast is his boundary, that will give him very much more; it is also remarkable that, on the Plan annexed to his "Procès Verbal," his boundary line does not extend along the sea coast; it stops at point X, leaving a considerable interval between the sea coast and that point, (*Vide original plan of* 1788.) The other side goes upon a certain dotted line, which is only a "ligne d'opération" which the Surveyor found necessary to carry on his work, but which is not part of the work. Even supposing the sea was the boundary, Art. 104 of the CODE DECAEN (1807) applies to this concession and all anterior concessions. If the law be so in general, *a fortiori* is it so in this case, for in the grant there is a clause by which the grantee is bound to obey all the requirements of the law made or to be made.

E. J. Leclézio, for Brue: The claim contended throughout, and the evidence bears out our contention, that the law is our's on the strength of the 30 years' prescription. If it is not, we are the lessees of Government and the Plaintiff is not the owner of the land.

J. L. Colin, in reply: My case, as to Brue, is complete; we served our Declaration in January 1864, asking damages, and the ejectment of Brue from our land; Brue pleaded that the land was his, and on the 28th of April 1864, he got a lease of the same land from the Government. That very land was surveyed by HILY, at the request of Martin, Brue's predecessor, and that survey binds him. The Defendant did not prove prescription, the evidence is clearly in our favor, and shows that prescription was interrupted, even if Brue had shown that it had ever existed.

As to the claim of Government, before the CODE CIVIL the sea shore belonged to the King, not to the domain, and there were in Mauritius no "Réserves" or "Pas Géométriques." "Réserves" meant those lands which had not been conceded by Government, and the "bords de mer" might be conceded, and if the boundary given was the sea, then the "bord de mer" went with the concession. (*Vide Regulations for Crown lands on 23rd June* 1864) they show that the "Pas Géométriques" did not exist when a concession was granted up to the sea.

It was argued that the "Arrêté" of the CODE DECAEN was declaratory; the word "Pas Géométriques" is created there; the CODE DECAEN does not admit of "Réserves" but speaks of them as things which might be alienated; I maintain that, in our grant, the sea is the boundary of the concession; all Surveyors and plans, save Captain Morrison and his plan, agree to this, and that must serve to construe the grant Quélin. Our author asked a grant from the concession Malno to the sea, and he got it. A concession is an absolute grant and constitutes us full owner of that portion of land, no new regulation could touch me except so far as they could modify my user of the land. (*Reads the clause and the Arrêté* 144, No. 7.)

JUDGMENT.

The question now before the Court is this: To whom does the small plot of ground on which have been erected the buildings which it is sought to have removed really belong? The issue was first restricted to the respective claims of the Plaintiff and Defendant, but on examining the documents submitted to us by the parties, we thought that the parties were in reality struggling for that which appeared to have been conceded to or acquired by neither of them but was still the property of Government. Our doubts were increased when we found that the Defendant had taken a lease of that very same land from Government; and we thought it best that notice should be given to Government. That was once, and on receiving notice Government assumed the position of proprietor of that land.

The original Plaintiff however maintained the ground on which he had, from the first, taken his stand; whilst the Defendant, without throwing up his original pretentions, took shelter under the more serious one of Government.

We shall at once dispose of the Defendant Brue; his plea of jurisdiction was clearly untenable and was not supported; his Plea of own-

ership, under the thirty years' prescription, we are of opinion he has in no wise made out, and the case would be disposed of if Brue, after his original pleadings, setting up that he was the owner, had not further, by holding a lease from Government, made it necessary for us to decide whether Government, or the Plaintiff, was the real owner of the land in dispute.

That land is quite close to the sea shore, and whilst Duval contends that it was conceded to Quélin, from whom he held, along with the remainder of the estate, Government contends that it was not conceded and that, even if it was, it now at least forms part of the "Pas Géométriques" which Government reserves to itself; and also that, whilst the "Arrêté" of Governor General DECAEN was in reality declaratory, there is, if it were not, a *proviso* in the original grant to Quélin which makes that "Arrêté" binding upon the grantee and his successors.

The original grantee of the land in dispute had sollicited, from the then Government of Mauritius, a grant of the land situate between the *Marreaux Lubines*, le Sieur Deslauriers and the sea. The grant sollicited was allowed, but the boundaries were not, at least do not read, exactly as those applied, for the area of 130 arpents and 36 perches is conceded bounded as follows:— North, by the various sinuosities of the Rivière du Poste and its mouth; W, by Martin; S, by Widow Malno, E, by the "Réserves" of the sea shore up to where the arm of the sea which is close upon the *Gros Ilot* enters the land, and that is to be ascertained by drawing a line North 6.° West along 74 perches. Now, looking at the plan, it is to be noticed that there is a long line of sea coast which is not mentioned, and which, according to the Plaintiff's theory, would be his boundary, whilst, according to Government, between the Plaintiff's real boundary and the line of sea coast, the "Réserves" or "Pas Géométriques" extend. It is precisely on that contested slip of land that the store in question is to be found.

If we construe the words "Réserves du bord de la mer," which are found in the deed of grant, to apply to the whole line of sea coast, the Plaintiff has no case, for the "Réserves" form his boundary, and are not included within the grant; but those words seem, when we follow the directions of the lines in the plan, to apply rather to the Eastern boundary, where there are "Réserves" which extend to the sea shore especially mentioned. Still it is strange, if this be so, that this long line of sea coast should not be mentioned at all in the boundaries given in the grant, which would thus have limits traced everywhere except in that part of the figure. The Plaintiff says: Quélin asked for the land up to the sea and got it; but the grant says nothing of the kind: the grant says not a word of the sea, except in connection with the "Réserves," which would imply that there were sea shore "Réserves" at that time, although not known under their more modern appellation of "Pas Géométriques." Again, to avoid this difficulty, the Plaintiff says: this line of sea coast we clearly asked for as our boundary, and it is included in the words "sinuosités" of the "Rivière du Poste" and its mouth. But it is hardly possible to suppose that the River and the "bras de mer" which, from its position on the plan, is not the estuary of a River at all, should have thus been confounded together. But there is evidence to show that they were not so confounded together, for, on the one hand, the grant speaks of the "Rivière du Poste" and its mouth forming the Northern boundary, and on the other hand speaks of the "grand bras de mer," by that name, in connection with the eastern boundary. We do not see therefore, from the terms of the grant, that the land conceded to Quélin was to extend up to the sea; nay, if we connect the extremity of the eastern boundary with the northern, by a straight line, the concession, upon the Plaintiff's assumption, would cover, not the sea shore only, but part of the sea. The Plaintiff further says that the Surveyors have always construed the grant as he has done. As a rule, no doubt, the *cursus curiae* is the law of the Court, and this may be true of many practices and formalities which are sustained until formally abrogated; but the argument does not apply to the surveys made by Officers upon the data given them by the owners or claimants of the land, or at least does not hold good against the right of Government, unless Government has acquiesced in such surveys, and that is not shown. But in reality the fact is not such as the Plaintiff would have it.

Pastourel's evidence clearly explains why, whilst the whole outline of Quélin's concession is tinted in the original plan made by Train, there is no tint along the coast line of the "Gros Bras de Mer" where the store now stands, "for, this" he says, "was well understood to be, as usual, the Government sea-coast "Réserves," was not measured, at the time, and remained untainted."

Now the "Arrêté" of the CODE DECAEN, Section 144, seems *à priori* to assume that the "Pas Géométriques" or "Réserves," existed from the beginning; it even goes so far as to assume that those grantees of land whose titles give them the "bords de mer" as a boundary, have got no more than the "bords de mer" *minus* the necessary "Réserves." The reason is given by the "Arrêté" itself; the "Réserves" are the shores of the sea; they are required for public purposes, for the protection of this Island and its sister colony. Now, when we compare this "Arrêté,"—which is so positive in its enumeration that some individuals pretend to hold the "Réserves" because their title deeds designate the sea shore itself as their boundary line,—with the absolute grant before us, where, although prayed for, the sea shore is no where actually given as a boundary line, we are led to the belief that Quélin never, in reality, had any claim upon that portion of the sea shore which now includes the "Pas Géométriques" and which, at that time, was occasionally conceded as a boundary line.

If we read on the "Arrêté," we find it declared or enacted that such "Réserves," including as they do the "Réserves" held by them who had the "bords de mer" for their limits, are incapable of becoming private property, but form essentially part of the public domain. But, whether we could, from the "Arrêté," construe

that law as declaratory of the rights vested in Government, or whether it should be construed as an enactment by which Government resumed, for public purposes, the property of the sea shore lands, it is hardly, we think, necessary to decide; the case turns on other grounds.

We think it very clear that, whether grants of land were or not made to private individuals, with the sea as a boundary, Government, from the earliest days, kept a strict supervision over the lands bordering the sea. We find, for instance, in Ordinance 193 (26th September 1772) CODE DELALEU, page 232, that it was decreed that individuals, who possessed land neighbouring the sea shore, were bound to allow 400 toises of trees, reckoning from the sea line of the wood inwards to the main land, in the condition in which they stood, with strict prohibition to cut down the same, or allow it to be cut; and this applies not to mere possessors, but to proprietors of lands bordering upon the King's forests on the sea shore; and the reason given is exactly that which, in 1807, Governor General DECAEN gave: the safety of the Colony, and the general welfare.

It is also to be remarked that this is to be found in an Ordinance promulgated for the Regulations of Concessions.

It is evident that the Power from which grants of land then emanated did, from time to time, enact rules and regulations for the proper settlement of questions connected with concessions; and *inter alia*, rules to regulate the mode of holding and of user of the lands bordering on the sea shore.

We shall now suppose that the "Arrêté" 144 was an enactment and could not, even as a measure of general safety, be made to have a retroactive effect.

There is, however, no doubt that it contains certain orders to be complied with by grantees of land, and the measure is so sweeping that, *à priori*, it comprehend those who claim the "Réserves," because in their title deeds the sea is the boundary assigned to their grant. One of those orders is that the "Réserves," or the "Pas Géométriques," are inalienable, and are maintained on the whole coast line of the Isles of France and Bonaparte. Another rule is that the area of the "Réserves" shall be ascertained and made clear by a boundary line which shall separate sea "Réserves" from lands which are private property, and the property of the state, or contiguous "Réserves" of any other nature.

If this "Arrêté" is not declaratory, (and although we cannot presume a law to be declaratory which merely touches private rights, it is far less difficult so to hold it when it is intended for the defence of the country against foreign enemies,) Quélin, or Duval after him, would *à priori* not be bound by it; but Quélin was not a holder under Government for a consideration; he was a grantee of land gratuitously conceded, and Government could, as a condition, impose, and did, as a condition to the grant, impose this *proviso*, that the grantee should conform himself, in every point, to such Ordinances and Regulations made or to be made in respect of Concessions.

Now, by an Ordinance already promulgated, Quélin might be compelled to allow, if there were any such, a slip of woodland between the sea shore and his property. This however would not give to Government the right to take the land back and lease it to owners.

But by an "Arrêté" subsequently promulgated, in respect of Concessions, it was ordered that the "Pas Géométriques" should be respected and should be maintained all along the coast, and should be "inaliénable."

If then we consider that the "Arrêté" 144 was not declaratory, and of this we say nothing; if we consider that Quélin obtained what he asked, the sea shore as a boundary, and this does not appear either from the original plan or the terms of the deed of grant; if we further consider that the sea coast of the "Bras de mer" or "Réserves" thereof, not being mentioned as forming part of the boundaries of the grant, that section of the plan must be meant to be included either within the northern or the eastern boundary, and that is only a loose presumption; there would still remain the fact that Quélin took the grant under certain positive conditions, one of which was that he would be bound by past or future regulations touching Concessions.

By the "Arrêté" of 1807 it was ordered that the "Pas Géométriques," to wit: 50 paces of land or shore from high water mark landwards, should be kept along the whole sea cost, by Government, to provide for the security of the Island, and should essentially form part of the Public Demesne, Quélin then, under the specific condition of his grant, was bound to suffer the resumption, if resumption it be, of that portion of land.

Nor do we think this construction hard upon the grantee; for many years no one seemed to have cared for this half acre of rocky barren ground. According to Captain MORRISON's evidence, Duval now holds, without the "Réserves," as much land as was originally conceded to Quélin. Nor could Quélin or his successors be misled as to the *proviso* clause contingent on future Ordinances, for there had been Ordinances which had already practically deprived those whose Concessions seemed to include the sea coast of all real ownership of that sea coast.

On the whole, we are of opinion that the slip of land in question is Government property, and that Duval cannot compel Brue, who holds a lease under Governmemt, to remove his stores. But assuredly this is not a case for costs; Brue, in his pleadings, did not set up his lease, which turned up afterwards; he strongly maintained that the land was his through the operation of the *longissima prescriptio*, and failed. He never called in Government, on the strength of whose title, and that alone, Duval is thrown out of Court, nor was his Plea to the jurisdiction maintained.

We shall dismiss the action, but without costs.

SUPREME COURT.

NOVATION,—ACTION EN RADIATION D'INSCRIPTION, — OUVERTURE DE CRÉDIT, — COMPTE COURANT, — BILLET A ORDRE, — GARANTIE HYPOTHÉCAIRE,—EXTINCTION DE LA GARANTIE PAR NOVATION.

L'insertion, par consentement mutuel, d'une créance hypothécaire dans un compte courant, peut-être généralement considérée comme opérant une novation qui éteint la garantie hypothécaire, lorsque le compte courant a été clos et arrêté et la balance payée au moyen d'une délégation ; à moins qu'il ne résulte des circonstances ou de stipulations expresses que l'intention des parties n'était pas de faire novation.

Celui qui a garanti, par une hypothèque, le paiement d'un billet à ordre, se trouve libéré par novation lorsque le billet est porté au debit d'un compte courant clos et arrêté entre le porteur et le tireur et dont la balance a été payée au moyen d'une delégation, sans qu'il ait été fait de réserve de la part du porteur, ni donné avis au garant du défaut de paiement du billet à son échéance.

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NOVATION,—ACTION FOR THE CANCELLATION OF AN INSCRIPTION OF MORTGAGE,—ADVANCES,—ACCOUNT CURRENT, — PROMISSORY NOTE,—MORTGAGE SECURITY,—EXTINCTION OF GUARANTEE BY WAY OF NOVATION.

The insertion, by mutual consent, of a Mortgage claim in an Account Current may be generally considered as constituting a novation by which the Mortgage security is extinguished, when the Account Current has been closed and approved and its Balance paid by means of a transfer of claim, "délégation"; unless it results from circumstances or express stipulations that the intention of parties was not to consent to a novation.

The Mortgage security agreed upon to guarantee the payment of a promissory note is extinguished by novation when such promissory note has been brought to the debit of an Account Current closed and approved, between the bearer and drawer, and the balance whereof has been paid by means of a transfer of claim, "délégation," especially when no reservations were made by the bearer, nor any notice given to the surety of the want of payment of the promissory note at maturity.

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LANGLOIS AND WIFE,—*Plaintiffs,*

versus

EV. PILOT & CO.—*Defendants.*

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Before:

The Honorable MR. JUSTICE BESTEL, *and*
The Honorable MR. JUSTICE COLIN.

—

The Hon. L. ARNAUD,—of Counsel for Plaintiffs.
J. PIGNÉGUY,—Plaintiffs' Attorney,
E. J. LECLÉZIO,—of Counsel for Defendants.
E. BOULLÉ,—Defendants' Attorney.

—

12th January, 1866.

This was an action brought by the Plaintiffs to recover judgment to the effect that a certain obligation, dated September 17th, 1863, signed by the Plaintiffs, and wherein they acknowledged themselves indebted to the Defendants in the sum of $ 3,455.83, which sum they promised to pay, without interest, on the 30th November following, should be declared extinct, to all intents and purposes; and that an inscription of mortgage, enrolled in consequence thereof at the Mortgage Office, on the 18th September 1863, in Vol. 130, No. 330, be erased from the registers of the said Office.

The Hon. L. ARNAUD and E. J. LECLÉZIO were respectively heard for the Plaintiffs and Defendants. The facts are fully detailed and the arguments noticed in the following judgment of the Court:

JUDGMENT.

The contract, in virtue of which the inscription of mortgage which the Plaintiffs seek to annul was taken, is to be found in a notarial deed, drawn up by Mr. BARRY and his fellow notary, on 17th September 1863. From its contents we find that Mr. Anatole Langlois and his wife, who had a separate estate, bound themselves, jointly and severally, to pay to Messrs. E. Pilot & Co. the sum of $ 3,455.83; and further that, to secure payment of that sum of money, Madame Langlois consented that an inscription of mortgage should be taken on her house, at Champ de Mars, which house formed part of her separate estate.

But that deed does not stand alone. On the same day, 17th September 1863, the Defendants Ev. Pilot & Co. signed a "*contre lettre*" by which they acknowledged that the mortgage obligation in question was given them only as a security for the sum of $ 3,455.83, which sum was the amount of a promissory note made by Anatole Langlois, and due on the 30th of November following, for the balance of the sale price of a vacuum apparatus, sold to A. Langlois by J. & J. Brodie, and which Ev. Pilot & Co. had jointly and severally promised to pay. The Defendants further promised that, as soon as A. Langlois had paid the note in question, they would relieve his wife and him from the mortgage security which Madame Langlois had consented to give, and desist from their privilege on the vacuum pan and accessories.

It follows from the latter document that the mortgage given by Madame Langlois, on her house at Champ de Mars, which house forms part of her separate estate, was given solely as security for the payment of a note, made by A. Langlois, for balance of the price of a vacuum pan apparatus.

It appears that the note in question was not paid by A. Langlois, but paid to the holders by the Defendants, who had endorsed it.

It does not appear that notice of dishonour was given to Madame Langlois. It appears that on the 30th November 1863, the day on which the promissory note became due, and was paid to the Commercial Bank by the Defendants, the Defendants carried the amount thereof to the debit of Anatole Langlois, in their Account Current; they however kept the promissory note in their own hands.

But on the 1st June 1863, Ev. Pilot & Co. had, by a contract drawn up by Mr. E. GIMEL, Notary public, bound themselves to make advances to Anatole Langlois, and by the 8th Article of that contract, a final settlement between the parties was to be made, at latest, on 28th February 1864.

It was on account of such advances that an Account Current was opened between Ev. Pilot & Co. and Anatole Langlois.

To that deed, Mme. Anatole Langlois was made a party, and gave to E. Pilot & Co. priority for the amount of the balance, if any, which might be due to them, over her own legal mortgage, so far as such mortgage encumbered the *L'Emma* estate, but expressly stipulated that she did not extend her waiver of such legal mortgage, *in favorem*, to any other real property.

On the 19th of March 1864, Anatole Langlois transferred to Ev. Pilot & Co. the sum of $7,600, due to him by Louis Numa Paillotte, the said sum to be received by E. Pilot & Co., on account of any balance due to them by A. Langlois, E. Pilot & Co. declaring that they in no way waive or innovate upon the rights, mortgages, etc., resulting from the contract of 1st June 1863: that relative to the advances, (ouverture de crédit) but specially reserve them.

No reservations are made relative to any rights or mortgages arising from any other contract.

The Plaintiffs now say that they are, or at least Mme. Langlois is discharged, from her warranty, because the claim for which she became surety was innovated upon, by the fact that the Defendants themselves, instead of standing upon the warranty, entered the amount of the claim to the personal debit of Anatole Langlois, in their Account with him, for the payment of which Account Current, Mme. Langlois has yielded priority over her own legal mortgage, but had not given a special mortgage on her private and separate estate. That lady further urged that when the Defendants received a transfer of $7,600, on account of the balance of their Account Current, they reserved their rights resulting from the contract relative to the *Ouverture de Crédit*, but no other rights, specially no rights which they might allege to have against Mme. Langlois' separate estate, knowing full well that those rights no longer existed, and that to the one debt, which she had given security for, another debt had been substituted by the Defendants themselves.

Novation is a mode of extinguishing a debt, by substituting a new debt to the former one, or a new debtor to the former debtor or a new creditor to the former one. Novation, by the Roman Law, was to be expressed: "*nisi ipsi specialiter remiserunt priorem obligationem, et expresserint quod secundam magis pro anterioribus elegerint.*" But our Code has not adopted that doctrine. With us, novation is not presumed, but it need not be expressed; it is to be gathered from the intent of parties, as disclosed by the facts connected with each particular case. Hence, many apparently discordant Decisions, which may be easily reconciled when the facts on which they turned are considered.

There are of course broad land marks. When the holder of a promissory note or bill of exchange unpaid, accepts another note or bill of exchange, in renewal of the unpaid one, he substitutes a new debt to the old, for, except under special conditions, the new and the old bill cannot co-exist for the same debt. *A fortiori* is this the case when the parties to the renewed bill are not essentially the same as the parties to the bill given in renewal. But if the holder and principal debtor expressly agree that the holder shall keep the first note as security, and notice of dishonour and of such agreement be given to those who are not formally parties to the renewal, and acquiesced in, this may be held to exclude novation.

On the other hand, whilst it has been ruled that the holder of a vendor's claim, for instance, who accepts bills in payment, is not necessarily presumed to have waived his vendor's claim, (*Syndics Liénard* v. *Festau*, C. R. PARIS, 18th March 1825,) it has also been held, (in *Bounault* v. *Delapare*, C. CASS, 30th November 1829.) that if a creditor, instead of receiving the funds which his debtor has deposited at a banker's for payment of his debt, chooses to take the banker's paper, the debtor has been legally discharged, although, through the banker's bankruptcy, the creditor has not been paid.

In the case before us, we find that E. Pilot & Co., when the promissory note, to secure which Mad. Anatole Langlois had given a mortgage on her separate estate, became due, did not make good the security they had thus obtained, but entered the amount of the note in their Account Current with Anatole Langlois. It must not be lose sight of that the note in question was, by the Defendants, stated to become due on a day certain, the 30th November 1863; it is also important to note that, besides the security given by Madame Langlois, on account of the note in question, that lady had given, for the amount of the Account Current between the Defendants and her husband, another security, to wit: priority over her legal mortgage on the estate *l'Emma*, but no further. There then stand two different contracts. Madame A. Langlois had two rights to dispose of: First.—Her legal mortgage over her husband's estate; and that she waives in favor of the Defendants, to secure to them their balance of Account Current, on account of the

advances they make for the working of the estate *l'Emma*, but no further. Secondly.—Her separate estate, which she charges with a mortgage in waranty for the payment of the note in question, but no further.

What takes place now?

The note is unpaid by A. Langlois, on 30th November 1863, and Ev. Pilot & Co., without giving notice to Mad. A. Langlois, who has a separate estate, that the note has been dishonoured, choose to carry the amount of the said note to the debit of Langlois, in their Account Current, and enter it on this way: " pour solde du prix du vide $3,455.83."

Prima facie, the question would start up at once: Why did not Madame Langlois, who had secured payment of a note due 30th November 1863, get notice of dishonour, and how long would the bearers of the note keep her bound, when it is plain that, having on the day that the note became due, a separate estate from her husband's, she might have then compelled him to apply his resources, or draw on his credit, to pay the note, and liberate her security? A case, it is true, may be found, in which an original co-debtor was, under the circumstances, still bound; but in that case there not only was the fact that the original title never left the creditor's hands, but there had also been expressed reservations, and the original claim was not converted into a claim by Account Current. That point was strongly urged, and if we could not assimilate Mad. Langlois to an endorser or "*donneur d'aval*," would probably have been conclusive.

But we think that, under all the circumstances of the case, it must turn on this point: Does the fact that Ev. Pilot & Co. debited Langlois, in their Account Current relative to the advances by them made for the l'*Emma* sugar estate, of the amount of the promissory note in question, operate as a novation, substituting to the claim upon the note and accessories, the claim upon the Account Current and accessories?

As a rule, writes DALLOZ, whenever, by the consent of parties, stated claims are entered in an Account Current, the Account Current becomes the title, and such title being substituted to those of the claims which it comprehend, carries novation.

Of course, without the creditor's consent, no such substitution can take place; here it was done by the creditors themselves, in the Account Current kept by themselves; the debtor also might object; here A. Langlois did not object, nay was sued and ejected without offering any objection in the strength of that very Account Current. The rule thus laid down by DALLOZ, the autherities consider as a settled rule; though of course exceptions will arise whenever, from the facts, a contrary intent can be gathered.

And thus, the COUR D'ORLÉANS (*in re Granville v Maisson*, 5th February 1812,) held: " De là il " suit, qu'à partir de son introduction dans le " compte courant de Granville, la créance dont " s'agit a fait partie intégrante du Crédit ouver " à ce dernier; que de civile qu'elle était elle " est devenue commerciale; que d'exigible qu'e l " le était, elle a cessé de l'être, pour jouir du " terme accordé à Granville par l'article 9 du " Crédit hypothécaire; et enfin que cette nouvel- " le dette a été substituée à l'ancienne; qu'ainsi " il y a eu novation dans la créance, et que par " suite elle a perdu le privilége qui y était atta- " ché, pour tomber sous l'hypothéque attaché à " l'acte de crédit."

Another reason relative to arrest in execution is added, which does not change the principles laid down.

That Decision tallies, in all essentials, with the case before us. There, as here, there was a privilege attached to the " Acte de Crédit;" as here a privilege attached to the special claim, Mrs Langlois waiver of priority on her legal mortgage in the one case, the mortgage security on her separate estate in the other. There, as here, by being entered in the Account Current, which was to be finally settled in February 1864, the debt which, upon the note, was due in November 1863, by Langlois, was postponed to February 1864 upon the Account Current; there as here, the basis of the whole transaction had been an " ouverture de crédit." Here the case may seem stronger, for whilst in *Granville v Maisson* the principal debtor was in the field, here novation is urged mainly by the surety. We say by the surety because the notarial deed of 17th September 1863 must be read along with the " contre lettre " signed by E. Pilot & Co. in favor of Mad. A. Langlois, and which modifies and explains it; and " contre lettres " are authorized by our law.

If we test that case by later Decisions, we find a case of "*Malherbe v Zil des Iles*," precisely in point (D. 57-2-157.) In that case, the COUR DE ROUEN held that the fact that a creditor comprehend, without reservations, the amount of his claim in an Account Current between him and his debtor, constitutes novation of the primary claim, and as a sequence, the extinction of the hypothec which secures it, when such claim has become one of the elements of the Account Current, and when, for instance, it produces interest no longer at the original rate of 5 pr o/o, but at the commercial rate (French) of 6 pr o/o like all the other claims contained in the Account Current.

This last fact is very important. Is not the nature of a claim clearly changed when, instead of carrying its stated rate of interest, it is made to carry another stated rate of interest, through incorporation in an Account Current. In the case before us, the debt to secure which Madame A. Langlois gave a mortgage, was to carry no interest; it is entered in the Account Current the conditions of which are widely different; the Account Current carries interest directly, and more, collaterally it carries commission.

There is a case in which the COUR DE CASSATION, evidently upholding the same doctrine indirectly, held that the entry of a claim in an Account Current did not cause novation. It is the

case of *Pagniez* v. *L'hotellier* (D. 57.—1—347), but the COUR DE CASSATION adds: "S'il est "constaté que les parties n'ont pas eu l'inten- "tion d'opérer une novation." And if we look at the facts, we easily find that the principle is the same, but in that case, there was the clearest written manifestation not to operate novation. The facts are these: L'Hotellier had sold his office to Ellien; a sum of 10,000 francs was still due to him, and that sum he entered in his Account Current to the debit of that person. But in that very same Account Current, the amount of 10,000 francs is farther on deducted from the balance, as being the price of the "étude," "comme étant étrangère au compte, "et s'appliquant ou prix de l'office vendu par "L'Hôtellier à Ellien."

The result of the case is evidently this: That to enter a claim in an Account Current, when this is assented to by creditor and the debtor is, as a rule, to substitute a new debt to the old debt; but that this is not necessarily so, and that, either by express reservations, or by the particular mode of entry, parties, if so inclined, may avoid the charge of one debt to another.

With the principles laid down it must not be confounded that found in Decisions, that when bills are sent by A. to B. to be entered in Account current, they only form part of the Account current when paid as in the case of MARKETTAT (42-2-47.) The facts are widely different; the notes there are sent as money for the very purpose of being carried to the credit of the debtor; there were no two separate debts, no substitution of a debt by account current to a debt upon a totally different basis, no exchange of one debt for another.

It being now clearly understood that the amount of the note was, on the 30th November 1863, carried into the Account Current, without reservations, direct, or indirect, and that Madame Langlois gave, to secure payment of the Account Current, priority over her own legal mortgage, whilst the hypothec had been given solely on account of the note, it is right to consider whether, from the other facts, we can gather an intent different from that which must legally be implied from the nature of the transaction.

The facts that Mad., Langlois received no notice of dishonour, no notice that her security would be kept, and was therefore left in the dark and placed in the position of being unable to compel her husband, the principal debtor, to release her by meeting the claim, are of the greatest importance, and would, in our opinion, be fatal, if we could look upon Madame Langlois in the light of an endorser or of one whose status, when the note became due, had changed from what it was when the note was made; whether we can look upon Mad., Langlois, it is unnecessary to inquire, but those facts, at all events, do not favour the notion that, when Ev. Pilot & Co., carried the amount of the note into the Account Current, they did not intend to submit to a profit by the legal consequences of the transaction.

There is one fact which, under circumstances would have to be weighed in favour of the Defendants; they kept the note; did they do so to hold it as a voucher of the entry in the Account current or not, we do not know; but the fact loses its importance, when it is coupled with that very entry, in the Account Current, which was regulated by conditions quite different from those which governed the promissory note, different by the nature of the contract, different as to the time of payment, different as to the rate of interest, different above all, as to the nature of the securities.

But that is a vital point in the case. Madame Anatole Langlois had given priority over herself so far as "*l'Emma*" estate was concerned, to the Defendants, and for their advances to the *l'Emma* estate there is an account current between A Langlois and themselves. They choose to carry the amount of the note into that Account Current, so secured, and by so doing, they gain this (whether practically it be again or not, we know not) that they postpone Mad. A. Langlois' legal morgage on *l'Emma*, to their own claim, and they do this not for the amount of the Account Current as it would have stood, but for the amount of the Account Current as it would have stood, *plus* the amount of the note. They exchange the mortgage security on the house for the security arising from the cession of priority of Mad. Langlois' legal mortgage on her husband's estate. They held security A for the note and security B for the balance of Account Current, they choose to increase the amount of the balance by the amount of the note, the total being secured by security B, how is it possible that, without the assent of Mad. Langlois, or their own clearly expressed and notified reservations at the time, they can still keep security A., above all when securities A and B are always kept quite distinct and restricted to the particular object for which each was originally intended?

If we go on, we find that, after the amount of the note had been entered by themselves in their Account Current, E. Pilot & Co. accept a delegation, from Anatole Langlois of a sum of $7,500, and they do so in payment of the Account Current which contains the item of $3455.83. They however make reservations, but for what? For the mortgage they originally held upon the house at Champ-de-Mars? Not a word of it, but especially they reserve without novation their mortgage rights over the l'*Emma* estate, those rights to which Mad. Langlois' legal mortgage on the same estate had been postponed.

To that delegation, Madame Langlois is not a party, it does not concern her; we considered it merely to ascertain if, at any period of this transaction, we could find facts from which might be gathered an intent different from that which we think every fact on the contrary points to, and which the authorities draw, if not necessarily but generally from the transfer of a debt to an Account Current by the consent, most distinctly expressed, of the Defendants, who made the entry, and clearly implied from the conduct of the debtor, who suffered ejectment on the strength of the Account Current as it stands.

We are not wont to pay much attention to the

form of an entry in an Account Current, when the contract or quasi contract is sufficiently clear; but, as it is, the entry here does not favour the views of the Defendants; it ignores the note altogether, it is made for the original cause of the note, the price of a vacuum pan, which the l'*Emma* estate got and which here is charged as part of the advances. Of course those entries *per se* do not mean much, but if they mean anything, they do not mean that the special mortgage given by Madame A. Langlois on account of the note of which the account leaves no trace, was intended to be kept, despite the transfer and its usual legal consequences.

We are satisfied that this is a case in which we must sustain the theory of novation, and its legitimate sequence; we are of opinion that the Defendants have, of their own free will and choice, innovated their claim arising out of the note and secured by the special mortgage, for their claim arising out of the Account Current and secured by the cession of priority to them of Madame Langlois' legal mortgage on *L'Emma* estate. We think therefore that, this being the case, such special mortgage must disappear and should be erased from the Registers of the Conservator of Mortgages.

We are also of opinion that this is not a case for costs.

SUPREME COURT.

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EXPROPRIATION POUR CAUSE D'UTILITÉ PUBLIQUE, —PASSAGE,—RUE,—CHEMINS DE FER,—DOMMAGES ET INTÉRÊTS.

Les co-propriétaires d'un terrain situé au Port-Louis s'étant entendus avec le Gouvernement pour ouvrir au public, sur ce terrain, un passage ou rue, à l'extrémité duquel le Gouvernement a depuis construit un pont, et le Gouvernement ayant, plusieurs années après, pour l'établissement d'une voie ferrée, intercepté ce passage à l'une de ses extrémités, la Cour Suprême a accordé $1000 de dommages et intérêts, à plusieurs des co-propriétaires sus-mentionnés pour lesquels ce passage était d'une certaine valeur.

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EXPROPRIATION FOR PUBLIC PURPOSES,— PASSAGE,—STREET,—RAILWAYS,—DAMAGES.

When the Government, for railway purposes, had shut up one of the issues of a Passage open to the public in Port Louis, the Court found damages due to the proprietors of a large Building, to which the lane afforded a valuable access; the ground of the passage being the private property of that and other neighbouring proprietors, who had transacted with the Government, many years ago, to open the lane to the public, the Government contributing, to the creation of a Bridge at the end of the lane.

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LOUSTEAU & ORS.,—Plaintiffs,

versus

BOYLE,—Defendant.

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Before:

His Honor the CHIEF JUDGE *and*
The Honorable Mr. JUSTICE COLIN.

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The Hon. L. ARNAUD,—of Counsel for Plaintiffs.
J. PIGNEGUY,—Plaintiffs' Attorney.
S. J. DOUGLAS,—of Counsel for Defendant.
J. BOUCHET,—Defendant's Attorney.

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12th January, 1866.

In this case, the Plaintiffs set forth in their Declaration that, on or about the fifteenth day of March 1864, the Defendant, acting in his capacity of Chief Commissioner of Railways, did perform or cause to be performed, for certain alleged Railway purposes, certain works across a passage or private street, known by the name of "Passage Monneron," leading from Moka street to the Harbour of Port Louis. That the effect of these works is to stop the passage permanently, and that in fact all communication which existed through and by means of the said passage or private street has been stopped, and therefore considerable prejudice has been caused to the properties opening on the said passage, which was made on private ground and for the profit and use of the Plaintiffs.

That the Plaintiffs are the joint owners of a house and dependencies, situate at the corner of Moka street and the said "Passage Monneron," and opening on the said passage, which is the most practical means of exit from the said house and a most valuable means of communication for the house, which has been built for and always used by commercial men, for whom easy communication with the harbour is of immense consideration and advantage.

That the house and ground of the said Plaintiffs and of the minor Marie Noémie Lousteau form part and parcel of a large piece of ground, formerly composed of five acres, which said ground had been divided into eight lots and sold in the years 1832 and 1834, before the late Court of First Instance, in consequence of the levy of the same upon and against Messrs. Saunders & Wiéhé and the assignees of their bankrupt Estate.

That the passage above required to formed part and parcel of the said plot of ground, and has been reserved purposely, to be converted and has been converted into a thoroughfare, for the benefit and common use of the several purchasers of the several lots of the said ground so divided, and has been declared, by the clauses and conditions under and according to

which the said several lots were sold as aforesaid, to be common to all the purchasers thereof.

That the interruption in the communication of the aforesaid property with the harbour, by and through the passage aforesaid, is prejudicial to the interest of the Plaintiffs and has caused damage to the aforesaid property to the amount of fifteen thousand dollars.

The Defendant denied that the Declaration stated any sufficient grounds of action, and traversed all the allegations of the Plaintiffs in point of fact. He further alleged that the "Passage Monneron" had been for 30 years last past, a public street and thoroughfare and a street dedicated to the use of the public, and that the Plaintiffs, if they ever had any private right to the soil of the said street, have lost and abandoned such right; that as far back as the year 1837, the several proprietors of the plots of ground mentioned in the Declaration, in whose favor it is alleged that a common passage and thoroughfare had been reserved through the said "Passage Monneron," did then consent to turn the said passage into a thoroughfare for the benefit of all Her Majesty's subjects, and did then agree with the Colonial Government to dedicate the said "Passage Monneron" to the use of the Public, and from thence the said "Passage Monneron" has always continued to be a public thoroughfare and street, within the town of Port Louis.

The Defendant also pleaded that the works complained of in the Declaration had been made for Railway purposes, under the provisions of the Local Ordinances and that the Plaintiffs had sustained no damage by the operations.

The Plaintiffs joined issue on the facts and the law alleged by the Defendant.

JUDGMENT.

THE COURT.—As soon as this case was opened by the Plaintiffs' Counsel, the Court expressed considerable hesitation in entertaining such a question, which under the Ordinances regulating the construction of our Colonial system of Railways, ought, *primâ facie* at least, to have gone before the Commissioners appointed for disposing of questions of damage alleged to have been caused by the construction of the Railways.

Both parties however joined in soliciting the Court to hear and dispose of the case. They stated that certain practical difficulties had arisen in the way of proceeding before the Railway Commissioners, and that if the present inquiry were thrown out of the Court, there was a great risk, not only of inconvenience to both sides, but of a positive denial of justice.

In such a position of matters we allowed the argument to from, and we now proceed to give judgment on the different issues which have been raised by the parties.

By the written evidence which has been laid before us, it is clearly established that the narrow street or lane in question, is not the absolute private property of the Plaintiffs and the other proprietors of the piece of ground in the neighbourhood mentioned in the Declaration and which appears originally to have consisted of some five acres or thereabouts.

No doubt the "Passage Monneron" was, at one time, the exclusive property of those parties or their predecessors. But it is shewn by an agreement which was entered into between the owners and the Government, in 1837, that Government, on condition that the public should have the unrestricted use of the land, and other roads in the neighbourhood, agreed to be at the cost of the labor necessary for erecting a bridge, at the bottom of the lane, while the other parties, viz. the said neighbouring proprietors undertook to supply the materials.

The position of the Plaintiffs therefore, with respect to the lane in question, is a very peculiar and special one. It is neither so high and favorable as would arise out of an absolute right of private property, nor is it so weak and subordinate as it would be if the Plaintiffs had nothing more to say for themselves than this; that as members of the public community, they had suffered inconvenience by the shutting up of the passage in question.

The truth is that the Plaintiffs, as regards their legal situation and rights, occupy a sort of middle position. They are, we think, well entitled to say that it was part of the agreement made by their predecessors, in 1837, with the Government, as representing the public of Mauritius, that a passage, by the lane in question to the harbour should be assured to them, although the public generally were also to be allowed to pass that way.

It must be remarked that the right of passage, by the lower end of the lane which is now blocked up, was of special importance to those proprietors, whose land was admirably placed for commercial uses. It must also be noted that, so far as relates to the house and dependencies belonging to the Plaintiffs; those buildings have been used for the purposes of trade for many years, producing a very large return to the owners, in the shape of rent. It may very well be that the public generally have suffered some inconvenience from the closing of the "Passage Monneron," but the Plaintiffs have sustained positive loss in the depreciation in value of their premises.

If the Plaintiffs had sued merely as members of the mass of the Mauritian public, who had been put to inconvenience by the Railway operations at the foot of the lane, we should not have been able to sustain their claim, but, as we have already seen, the situation of the Plaintiffs, in the present case, is of a nature quite different. We think they are entitled to ask compensation as against the Government of 1865, representing the Government of 1837, with whom they bargained. The later Government of 1865 have shut up one of the outlets of the "Passage Monneron," for purposes of public utility, which the Government of 1837 impliedly bound themselves to keep open and the

right of circulation by which was of great importance and advantage to the Plaintiffs' property.

How then shall we estimate the loss sustained by the Plaintiffs, and which the Government is bound to repair ?

A number of witnesses were examined by the Plaintiffs and they differ very materially in their appreciations of the damage done to the Plaintiffs' premises by the Railway operations in question. The Plaintiffs have not been able to establish any positive special loss. It appears that their tenant, Mr. Jas. Currie, Merchant, has not as yet claimed any deduction from his rent ; but the distance from the premises of the Coaster's wharf is now considerably lengthened, a cart will require 8 or 10 minutes to traverse the distance which formerly it could accomplish in half the time. Loaden carts can be turned at one part of the lane only, from which there is now but one outlet to reach the upper end of the passage ; with a load, a considerable ascent has to be mastered, and this occasionally renders the addition of another micle necessary ; and all the witnesses concur in stating that the access of the premises generally is not so ready and convenient as it formerly was when food could arrive by the lower end of this narrow street.

For this deterioration, some compensation is justly due. The only witness examined for the defence was the Plaintiffs' tenant, Mr. James Currie, who must know the premises as well as any person, and in whose judgment and local experience the Court should place much reliance. He stated distinctly that, in his opinion, substantial injury has been caused to the property by the operations of the Defendant, while he cautiously declined to estimate the precise damage in money, as he stated that he had no sufficient materials to go upon.

Looking at the whole matter, in its different aspects, we think that the compensation to which the Plaintiffs are entitled may be fairly stated at £ 200.

For that sum we accordingly now give judgment, with costs.

SUPREME COURT.

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ACTION EN REVENDICATION DE MEUBLES,—PROPRIÉTÉ ET POSSESSION,—MARI ET FEMME,—BONNE FOI,—ART. 1595 DU C. C.

Un créancier sur jugement étant au moment de faire vendre les meubles de son débiteur, la femme de ce dernier réclama la propriété des dits meubles en vertu d'un acte de vente passé par le mari avant que le créancier n'eut intenté son action ; la Cour s'étant assuré, après une enquête rigoureuse, que la réclamation de la femme et la vente qui avait été passée en sa faveur étaient faites de bonne foi, et à juste titre, a reconnu la femme propriétaire des meubles saisis.

INTERPLEADER,—PROPERTY OF MOVEABLES,—HUSBAND AND WIFE,—BONA FIDES,—ART. 1595 CODE CIVIL.

Where a Judgment Creditor of a husband, when about to sell the furniture in the house of his debtor, was opposed by the wife of the latter who claimed the property of the articles, under a formal deed of sale made to her, before the creditor raised his action, the Court, being satisfied, on a rigorous scruting, that the claim of the wife and the sale to her were bonâ fide and just, awarded the furniture to her. Code Civil, Art. 1595.

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VIGOUREUX THE WIFE,—Plaintiff,

versus

PERDREAU,—Defendant.

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Before:

His Honor the CHIEF JUDGE *and*
The Honorable Mr. JUSTICE COLIN.

—

E. J. LECLÉZIO,—of Counsel for Plaintiff.
J. G. TESSIER,—Plaintiff's Attorney.
J. L. COLIN,—of Counsel for Defendant.
E. LAURENT,—Defendant's Attorney.

—

12th January, 1866.

On the 11th of May last, Victor Perdreau obtained a judgment from this Court, in a suit of damages at his instance, against Charles Vigoureux, for the sum of £84, with £39 19s. of costs. (See Supra, Vol. 5, p. 71.)

On this judgment a seizure of the furniture in the house occupied by Vigoureux, in the town of Port Louis, was effected by Usher Desiré Mai, on the 8th September last, and the articles were duly advertized for sale. At this stage of the proceedings, and on the 6th October last, Louise Lœtitia Routier, the wife of Vigoureux, authorized by the Judge at Chambers to take legal proceedings in the matter, lodged an opposition in the hands of the guardian appointed by Justice, of the property seized, and in the hands of the Usher, claiming the articles as her sole and exclusive property, in virtue of a deed of sale made and passed before Mr. Notary MAINGARD on the 30th January 1865, and duly registered, containing in the words of the CIVIL CODE, a " dation en paiement " up to the value of £1,108 as part settlement of all sums of money due by Vigoureux the husband to his wife under their marriage contract passed before Mr. Notary DUCRAY, on 12th November 1856, and duly registered.

The question of the right of property in the goods and chattels in question now came before the Court on determination by way of interpleader.

E. J. Leclézio, for Mrs. Vigoureux:—My client and her husband were married in 1856, and are separated as to property. It is shewn by our marriage contract produced, that she had a large dowry, and the husband was bound to pay her back all sums which he had taken possession of. He had not done so at the date of the sale of the furniture to us. That sale was just an honest payment of what was due to us or rather of a part of what was owing to us. There was nothing wrong in this. The husband only did his duty, for the wife was a *bonâ fide* creditor at the time, and Perdreau had not even begun his case.

J. L. Colin, for seizing creditor: every presumption is against *bona fides* in such a case as this. It is said that the marriage contract must be accepted as proof of the statements made in it. I regret to say that enormous frauds have been committed by false statements in those acts, as every person in Mauritius very well knows.

But even if we accept the marriage contract, it would appear that Mrs. Vigoureux was repaid all the money which belonged to her, before the so called sale of the furniture was made to her. (*Reads clauses of deeds.*) Therefore the alleged sale to her cannot be supported in competition with the claim of a judgment creditor of the husband. Vigoureux knew quite well, after the success of the first action against him, that Perdreau would sue him, and that successfully. There was no real change of possession of the moveables from the husband to the wife. There was not that *déplacement* which is necessary to possess the property. Troplong, *Prescription*, V. 2, No. 1062.

E. J. Leclézio, in reply, contended that there was no evidence that Mrs. Vigoureux was ever repaid the sums due to her.

The Court: It is clearly the duty of a Court of Justice to watch very narrowly transactions of this description, passing between persons in the confidential relation of husband and wife, whereby it may often be attempted to defeat the just and honest claim of a creditor of the husband. The creditor has got a judgment for his debt, and when he proceeds to make his demand effectual, by levy on the goods and property in his debtor's house, he is met with a statement by the wife that the articles belong to her in virtue of some later transactions or conveyance from the husband, whereby it is alleged that the property of the furniture in the common domicile has passed from him and become vested in her.

Nothing, in ordinary circumstances, can be more suspicious or more suggestive of a fraudulent attempt by the spouses to defy the execution of the creditor and preserve for their own use the moveable property in question.

But, on the other hand, there may be cases of perfect honesty and good faith. It may happen that the husband is really the debtor of his wife, who may have had a large marriage fortune with which he has interfered and which he is bound to replace and repay for her behalf. Every case must therefore stand on its own merits, after a due investigation into the circumstances.

Now what are the material facts here? The wife has established, by the production of regular notarial deeds, the truthfulness of which has not been seriously challenged or impeached, that, at the date of the sale of the furniture in question, her husband was her debtor to an extent much beyond its value. The sale was therefore not fictitious and was one of the sales or transactions between husband and wife which are allowed by the law, in terms of Art. 1595 of the Code.

It is farther very material to observe that, at the date of the sale, the present Plaintiff was no creditor of Vigoureux the husband. He not only had not established his claim of damages against the latter, but he had not even commenced the suit in which he was ultimately successful. We know judicially enough of those parties and of their transactions to believe that Vigoureux may have anticipated the probability of such a demand in damages being made against him by Perdreau and made successfully; but in point of fact, the suit, as we have seen, was not begun till after the sale of the furniture to the wife; and accordingly at that date Perdreau had not vindicated his rights in a Court of Justice and had no demand which he could make available against Vigoureux. It cannot be therefore even said that the conveyance of the wife was in prejudice of any right then known to exist in the person of another creditor.

In the course of the discussion at the bar, a good deal was said as to the want of any legal delivery to the wife of the articles of furniture in dispute, delivery being necessary to enable her to combat successfully the claim of Perdreau; but it is not easy to see what more could have been done in the way of taking and accepting delivery by a person living in the same house and entitled by law, equally with the husband, to call that house her home and domicile. She was found by the seizing Usher with a regular notarial deed, vesting her, *primâ facie* at least, with the ownership of the articles, and at the very time that she was, along with her husband, in the actual personal occupation of the dwelling house of which the articles formed the furniture.

We must therefore sustain her right in law to retain the articles as her property, but this is plainly not a case for costs.

SUPREME COURT.

Bail, — Propriétaire et Locataire, — C. C. Art. 1719.

Le Bailleur est obligé, par la nature du contrat, d'entretenir la chose en état de servir à l'usage pour lequel elle a été louée.

Ceux qui donnent à bail au Port Louis, de vastes immeubles servant au magasinage des marchandises, sont tenus d'entretenir ces immeubles dans un état de réparations locatives qui permette à la Chambre de Commerce de les admettre comme magasins publics.

LANDLORD AND TENANT,—LEASES OF WAREHOUSES,—C. C. ART. 1719.

A Landlord is bound by law to keep the subjects let in a state fit for the purposes for which they are taken in lease.

The owners of the great Storage Warehouses, in Port Louis, are bound to keep them in such a state of repair as to enable the Chamber of Commerce to grant Certificates that they are fit to be licensed as public warehouses.

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THE PLANTERS' DOCK COMPANY, Plaintiffs,

Versus

MARTIN MONCAMP, Defendant.

—

Before:

His Honor the CHIEF JUDGE *and*
The Honorable Mr. Justice BESTEL.

—

J. L. COLIN,—of Counsel for Plaintiffs,
F. ROBERT,—Plaintiffs' Attorney,
The Hon. V. NAZ,—of Counsel for Defendant,
E. DUVIVIER,—Defendant's Attorney.

—

12*th January* 1866.

On the 29th November 1864, the following lease of certain premises in the town of Port Louis was passed between the Plaintiffs, who are public Warehousemen there, and the Defendant, the proprietor of the subjects:

" Entre les Soussignés,

" Monsieur G. M. Moncamp, propriétaire, de-
" meurant à Port Louis, d'une part;

" Et La Société du Planters' Dock Company,
" établie en cette ville de Port Louis, d'autre
" part.

" Il a été arrêté et convenu ce qui suit:

" Monsieur G. M. Moncamp donne à bail pour
" dix huit mois, à partir du premier Décembre
" prochain pour finir le premier Juin mil huit
" cent soixante six, à la Société du Planters'
" Dock Company, ce qui est accepté par Mon-
" sieur Arnaud, agissant au nom de la dite So-
" ciété,

" La propriété de Monsieur G. Martin Mon-
" camp, située en cette ville de Port Louis, rue
" du Pavillon, connue sous le nom de l'Etablisse-
" ment Bretonnache, ensemble les maisons, bâ-
" timents, magasins, et autres dépendances, y
" élevés, sans aucune exception ni réserve et tel
" que tout se poursuit, étend et comporte, et
" ainsi qu'en jouissait Madame Ve. Rendle &
" Cie., le tout devant être livré en bon état de
" réparations locatives. Il est entendu que les
" terrains et bâtiments loués à MM. Barbier &
" Cie., ne sont pas compris dans le dit Bail.

" Ce Bail est fait pour et moyennant la somme
" de six cents piastres par mois, payables le
" premier de chaque mois.

" Fait double, au Port Louis, le vingt neuf
" Novembre mil huit cent soixante quatre.

" Approuvé

" (Signed) G. M. MONCAMP."

At the date of the lease the premises held the license of the Chamber of Commerce. That body is entrusted by the Colonial Law with the duty of certifying that premises are fit and proper to be licensed as public wharehouses. Without this certificate the owners of the different articles of merchandise stored in a magazine would not be able to avail themselves of the facilities given by the use of Dock Warrants to raise money upon the security of their property so deposited.

On the 4th of March last, the Plaintiffs served upon the Defendant a *mise en demeure* setting forth that the goods deposited in the premises had frequently been damaged by water flowing into the wharehouses, when it rained; that in particular, on the 12th of the preceding February, the water had stood several feet high in the premises and had done great damage to the goods of their customers stored therein; that their customers had ever since refused to permit their goods to be placed there any longer; that the Defendant was bound to make the premises fit for the purposes for which they were let; and that this could only be done by raising the floor of the premises six feet, which the Defendant was summoned immediately to do, otherwise, it was intended that an action of cancellation of the lease would be raised.

There was some evidence to shew that the Defendant, at one time, intended to comply with the request made in this summons. At all events he employed men and carts during several days to deposit earth on the floor of part of the premises, but subsequently desisted from this operation.

The present Declaration, served on the 18th April last, set forth the above quoted lease, and *inter alia* that the grain and sugar deposited in the premises had frequently been seriously damaged by water flowing into the stores, during heavy rains, and concluded that the Defendant should be made to complete the work he had begun for raising the floor within two months from the date of the judgment, or failing so that judgment of cancellation of the lease should be pronounced by the Court.

The Defendant denied the facts alleged by the Plaintiffs, and pleaded, more particularly, that he did not let the premises for any special or particular purpose; and that if water did enter the premises, it was a case of "*force majeure*"

for which he was not responsible; that there was no vice or defect in the buildings for which he is bound to answer; that any raising of the floor is quite unnecessary; that the Plaintiff, by continuing to pay the rent all along have debarred themselves from insisting in the present demand; that the Defendant, under express reservation of all his rights, had offered, before the action was raised, to provide for any chance or danger of inundations, by raising in masonry the level of certain of the doors of the magazine, with cut stones and Roman cement, and besides to make good the joints of the walls, with Roman cement, inside and outside, up to such height as the Plaintiffs may wish, so as to prevent the possibility of any water getting into the store.

On the 3rd November last the Court, after hearing witnesses and the Counsel for the parties, pronounced the following interlocutory order:

" Upon hearing Mr. Colin, of Counsel for the " said Plaintiffs, and the Honorable Mr. Naz, of " Counsel for the said Defendant, it is ordered " that the parties in this action be and they are " hereby referred to the Chamber of Commerce " who will examine any Engineer or Architect " they please and report to the Court what re- " pairs are necessary for them to grant their " usual Certificate; all rights of parties reserved."

On the 29th November the Secretary of the Chamber of Commerce forwarded to the Registrar of the Supreme Court, a Report on the magazine in question by the Committee charged with the examination of the stores in town.

That Report was in the following terms :—

" COMMITTEE FOR THE EXAMINATION OF STORES.

" Port Louis, 22d November 1866. — Your " Committee, after reading the annexed Deci- " sion of the Supreme Court, referred to them " by the President of the Chamber, proceeded to " reexamine the store called Magasin Rendle, " and in conformity with the request of the Su- " preme Court applied for the advice and opi- " nion of an Engineer.

" Not being able to obtain the assistance of " Captain Morrison, he being absent from town, " your Committee requested Mr. Vandermersh " C. E. to examine the buildings and to give his " opinion in writing as to the repairs required to " render it safe and secure for the warehousing " of perishable goods such as sugar.

" As soon as the Report of Mr. Vandermersh " was received, Mr. M. Moncamp was requested, " by letter, to attend at a meeting of the Com- " mittee, in order that he might have an oppor- " tunity of explaining what repairs he proposed " to make to the store previous to the Committee " giving any opinion.

" The Report of Mr. Vandermersh having been " communicated to Mr. Moncamp, he declared " that he only intended to wall in the openings " of the store looking into the " Butte aux Ton- " niers " stream, and raise the floor one foot and " a half; he asked for time to be able to lay be- " fore the Committee the opinion of some com- " petent person in support of his own.

" But Mr. Moncamp having, by letter of 21st " instant, declined to send any report as he pro- " posed to do, and having requested to be again " heard with all the other parties concerned, " your Committee, not considering any further " inquiry necessary, proceeded to form their opi- " nion as follows:

" Your Committee find that the Report of " Mr. Vandermersh herewith annexed fully con- " firms the Report of your Committee of the " 13th June last unanimously adopted by the " Chamber, at its meeting on that day, the " Engineer consulted considering that instead of " three feet, the floor of the store should be rai- " sed three feet nine inches to render goods per- " fectly safe in an inundation like that of Fe- " bruary last.

" Your Committee, therefore, after carefully " weighing the facts contained in the Report of " Mr. Vandermersh, and in presence of the writ- " ten declaration of Mr. E. Merle, Town Archi- " tect, that there was three feet of water in the " Magasin Rendle during the last inundation, " would not be disposed to recommend that a " certificate be granted for the said store until " the floor has been raised three feet nine inches " above its present level.

(Signed): H. ADAM,
A. JOLY,
EM. BASSET,
HTE. JN. LOUIS.

" Adopted by the Chamber of Commerce on the 29th November 1865.

" (Signed) : JAMES FRASER,

"*President of the Chamber of Commerce.*"

The Report of the Engineer was in those terms :

" Port Louis, November 15th, 1865.

" To the Secretary of the Chamber of Commerce.

" Sir,

" According to instructions I received from " the Committee appointed by the Chamber of " Commerce, to examine the store situate in Pa- " villon street, and generally known under the " name of " Magasin Rendle," I beg to submit " to your Committee this, my opinion, as re- " gards the safety for goods in the said store in " the event of a flood.

" The actual level of the floor in " Magasin " Rendle," is, according to my observations, 5 " feet 3 inches above the sea, and the level of " the passenger platform in the Central Station " seven feet nine inches above the sea.

" It is a well known fact that, in the Inunda-

" tion of the 12th February last, the flood water " rose about six inches above the coping of the " passenger platform, which would make the le- " vel of the flood waters eight feet three inches " above the sea; supposing then the water " standing dead level from the passenger plat- " form to " Magasin Rendle," (on a length of " about 450 feet) the difference between the le- " vel of the floor in the store would be three " feet. Assuming, to be over, that for a velocity " of from 5 to 6 miles per hour, the difference in " the level of the water, from " Magasin Rendle " " to the platform, would be six inches, I come to " the conclusion that the floor of the store in " question must be raised three feet six inches " (English measure) to reach the level which the " water attained in the flood of February last; " and that in forming the floor 3 feet 9 inches " above its present level, the store will be per- " fectly safe against any similar inundation " which is the greatest one ever quoted in this " Colony.

" I think that, by placing retaining walls to " act as dams, in each of the openings of "Maga- " sin Rendle " to a height of 3 feet 9 inches " above the floor, the water might be kept off " for an hour or two, but this would be a very " imperfect measure in case the flood would " continue, as in the hurricane of 1861 which " lasted eight days. Then I have no doubt " the water would spring thro' the foundations " and walls of the building, and take its level " inside; I therefore would strongly recommend, " as the only efficient manner of rendering the " store perfectly safe against flood waters to have " its floor raised 3 feet 9 inches above its present " level, or according to the level marks I have " placed on all the openings. "

The case came on again for argument on 7th December last, when Counsel argued as follows:

THE HON. V. NAZ for Defendant: I contend that I am not bound to do any thing in this matter.

The Railway operations were completed before the lease began. The tenants saw the position of ma ters and should have taken steps to protect themselves. The store never was flooded before February last. TROPLONG: *Louage*, Nos. 198, 235. I also plead *Force Majeure*. DUVERGIER, "*Louage*" No. 342. I would, in any view, be bound only to make good loss actually sustained by my tenant, but that is not the nature of the present suit. BOILEUX on ART. 1721 C. C. which makes me responsible for any " vices ou défauts " in the subjects let.

I rely on the following authorities. S.—1849. 2,77—1841.2.131.—1842.2.15.—1839.2.94.—1825.2.148.

J. L. COLIN for Plaintiffs: The Defendant knew perfectly well what we took the lease for. It is mere affectation to say the contrary. Besides, the premises were taken specially for the same use and object as those for which Rendle & Co. employed them; that was for storing grains and sugars. For that purpose they are found to be unfit, hence our action is well founded. Besides, we must have a wharehouse legalized by the Chamber of Commerce, as we had at the commencement. Without a license a lease of these premises is valueless. A tenant, I submit, is not bound to suffer the consequences of such a flood. TROPLONG. " *Louage.* " No. 225 & No. 193. DALLOZ " *Louage* " 326. Our beneficial enjoyment is gone, and this entitles us to cancellation. C.C. 1719. TROPLONG. " *Louage*" No. 196. DUVERGIER on above article of the Code. POTHIER. " *Louage*," No. 160.

JUDGMENT.

In this case the Plaintiffs are public wharehousemen in Port Louis, and it has been clearly established that the extensive premises, the subject of the present lease, for which the Plaintiffs pay a rent of $600 a month, or £1,440 a year, were taken by them for the purposes of their trade. In this Colony every one knows and the witnesses have told us that among the leading subjects for storage, sugar and grain hold a very large place; indeed it may be said that the former commodity is almost the only produce of the Island which we have for exportation. When, therefore, such premises as those of the Defendant in the present case, usually known by the name of the " Magasin Rendle," are hired by wharehousemen for the object of their business, no one can doubt that they must be free from the danger of flooding by water, the access of which is so destructive to the articles which will form the larger portion of the goods to be put in store.

But moreover, in the present case, it is shewn by the written lease itself that the wharehouses taken on hire were to be used and enjoyed in the same way as the former tenants Rendle & Co. had used them. Now the evidence shows that they employed them for storing sugar and grain, and the Plaintiffs were entitled to rely on the Defendant maintaining the premises in a state fit for that purpose for which both parties well knew that the buildings were taken in lease. That was the obligation of the Defendant, for by Art. 1719 of the Code, it is declared: " Le Bail- " leur est obligé, par la nature du contrat, et " sans qu'il soit besoin d'aucune stipulation " particulière: 1o.de délivrer au preneur la chose " louée; 2o. d'entretenir cette chose en état de " servir à l'usage pour lequel elle a été louée; " 3o. d'en faire jouir paisiblement le preneur " pendant la durée du bail."

It is proved that the use to which the premises were to be turned by the lessees was the storage of sugar and grain, and it was the lessees duty to keep them in a fit state for that purpose.

We are satisfied that this can only be done by raising the floor of the height stated in the Report of Mr Vandermeersch, the Civil Engineer, consulted in the case by the Chamber of Commerce.

But further it is of great importance to remember that when the premises were taken in lease they had the certificate of the Chamber of Commerce, bearing that they were fit and proper for the storage of goods, and as such were entitled

to enjoy the privileges of a public licensed wharehouse. Now this certificate is of the highest value in Mauritius. If it is not granted, the great majority at least of the customers of the tenants, the wharehousemen, may be expected at once to desert him, for the owners of the goods will be precluded, by the defects of the magazines, from borrowing a single shilling under Dock Warrants, on the goods deposited in the premises. Accordingly the witness Mr. Henri Adam, Merchant, told us in his evidence: "as "a rule I would not store sugar or grain in a "wharehouse not duly legalised."

We are of opinion that it was an implied condition in such a lease as the one now before us, that the premises should be kept by the landlord in such a state as to secure the continuance of the certificate of the Chamber of Commerce. No doubt the Defendant says that the Chamber of Commerce is wrong in insisting that the only way to secure the Sugar and other perishable commodities stored in the magazine is to heighten the floor by so many feet, he alleges that his plan of building up the doors to a certain height and filling the seams of the wall with Roman cement is a preferable one.

But the Chamber of Commerce is legally vested with the power of saying what, in its discretion, ought to be done to make the wharehouse secure from the ingress of water, and the Chamber only ask the Defendant to do what it has suggested to various other persons similarly situated, who have followed its advice, and have duly obtained Certificates for their premises.

We see no reason to interfere with the Report of the Chamber of Commerce. It is the Report of gentlemen very well qualified to deal with such a matter and supported by what appears to be satisfactory scientifie evidence. We are not able to perceive that there has been any excess of power or any miscarriage of justice calling for our interferance. The Defendant had an ample opportunity of being heard, if he pleased, and no sufficient ground has been submitted to us for quashing the Report of the Chamber or even sending the matter back again for farther consideration.

We shall therefore allow the Defendant two months, from the date of this Judgment, to make the alteration proposed by the Chamber of Commerce; should he fail to do so, Judgment of cancellation of the lease will issue.

The Defendant to pay the costs of suit and the fee of £5 to Mr. Vandermeersh.

SUPREME COURT.

—

GRANDE ROUTE,—EXHAUSSEMENT DE LA ROUTE POUR CAUSE D'UTILITÉ PUBLIQUE,—PRÉJUDICE CAUSÉ A LA PROPRIÉTÉ PRIVÉE,—ACTION EN DOMMAGES ET INTÉRÊTS.

Le Gouvernement ayant, pour cause d'utilité publique, exhaussé le niveau d'une grande route aux approches d'un pont, sans en donner avis aux propriétaires voisins, et ayant par ce fait rendu plus long et plus difficile l'accès d'une maison située sur le bord de la grande route, la Cour Suprême a accordé $600 de dommages et intérêts au propriétaire de la maison.

—

IMPROVING A HIGH WAY FOR THE PUBLIC BENEFIT,—DAMAGE TO PRIVATE PROPERTY.

Where the Government in improving the access to a bridge by heightening a high road, without giving any notice to the proprietor of a house, situated close to the road, made the access to the house much more circuitous and difficult, the Court awarded £120 of compensation, with costs.

—

ECROIGNARD,—Plaintiff,

Versus

THE GOVERNMENT OF MAURITIUS,
Defendant.

—

Before:

His Honor the CHIEF JUDGE *and*

The Honorable Mr. Justice BESTEL.

—

J. L. COLIN,—of Counsel for Plaintiff.
A. J. COLIN,—Plaintiff's Attorney.
S. J. DOUGLAS,—of Counsel for Defendant.
J. BOUCHET,—Defendant's Attorney.

—

12*th January* 1866.

THE COURT: The Plaintiff complained that a large building, of which he is the owner, situate in the District of Flacq, close to the high road and near the District Court, had been seriously injured and deteriorated by the operations of the Government in heightening the level of the high road at that particular spot for the public advantage, and with the view of improving the access to a neighbouring bridge.

It appears, from the evidence, that the Plaintiff's house was erected a few years ago and is one of considerable size and value, and situated so close to the highway that before the alterations of level immediate access was got to the verandah by merely stepping in over a shallow "gondole," or ditch, which runs alongside of the highway, at that place, between the verandah and the road. The alterations on the highway were made by the Government, without any previous communication to the Plaintiff, and resulted in raising the level of the road, opposite his house, nearly 3 feet, the effect of which was to cut off the communication between the road and the verandah, and to leave between them a gap

of several feet in width. The Defendant constructed a crossing, *or rampe*, from the road at the end of the verandah, opening into the yard of the house, but provided no direct access to the verandah.

The Plaintiff demands $2,500 or £500, as a compensation for the loss and damages he had sustained. The Defendant traversed the Plaintiff's allegations in point of fact. A number of witnesses were heard in the case.

On a review of evidence we were satisfied that the Plaintiff is entitled to some damage in the way of reparation. It is evident that access to the house, as it now stands, cannot be got without considerable inconvenience, and in this respect a change, very much worse, and seriously impairing the value of the subject, has been caused entirely by the operations of the Government. The property has lost a considerable portion of its past marketable value by these operations, and an indemnity sufficient to place the Plaintiff as nearly as may be in his original position must, in justice, be awarded to him.

On considering the deposition of the different witnesses, we think that every claim of damage urged in this case may be held as fairly and reasonably compensated by an award of $600 or £120, for which sum, with the costs of suit, judgment is now given in favor of the Plaintiff.

SUPREME COURT.

—

ACTION EN REVENDICATION D'UN TERRAIN CONTRE LE DÉPARTEMENT DE LA GUERRE.—PETITION AU GOUVERNEMENT POUR OBTENIR PERMISSION DE POURSUIVRE,—"MONTRANS DE DROIT."

Une action intentée à la requête d'un particulier, contre le Département de la Guerre en cette Colonie, pour obtenir la restitution d'un terrain dont ce Département avait pris possession, ne peut être continuée devant la Cour Suprême tant que le Demandeur n'a point obtenu de la Couronne la permission de poursuivre.

—

PROCEDURE,—RIGHT TO SUE THE WAR DEPARTMENT.

An action to recover certain immoveable property said to have been wrongfully appropriated by the War Department of the Colony cannot be insisted on without the usual Petition in such cases being presented and granted by the Crown.

—

MURRAY,—Plaintiff,

Versus

JOHNSTONE,—Defendant.

—

Before:

His Honor the CHIEF JUDGE, *and*
The Honorable MR. JUSTICE COLIN.

—

E. DUPONT,—of Counsel for Plaintiff.
E. DUCRAY,—Plaintiff's Attorney.
S. J. DOUGLAS,—of Counsel for Defendant.
J. BOUCHET,—Defendant's Attorney.

—

12*th January* 1866.

In this case the Plaintiff sued the Defendant, as representing the War Department of the Colony, to surrender and restore to him a piece of ground which the Plaintiff claims as his property, and which, he alleged, had unlawfully and without title been taken possession of by the said War Department, and given over to the Civil Government for Railway purposes.

Before pleading on the merits, the Defendant objected that the War Department cannot be called upon to implead in the present action without a petition of right, a *montrans de droit*, being first presented to and admitted by the Crown, and that no such petition of right, or *montrans de droit*, having been presented by the Plaintiff before bringing his present action, the suit must necessarily fall to the ground.

Parties were heard at length on this preliminary objection. The Plaintiff contended that such a permission from the Crown, though usually asked for, was not absolutely required under pain of an immediate dismissal of the action, and that, in point of fact, an application for leave to sue Her Majesty had been sent to the Head of the War Department in England soon after the suit was raised, but that no answer had as yet been received.

THE COURT: We are quite satisfied that the present suit, directed as it is against the Head of one of the Great Departments of the State, ought to have been preceded by a Petition of right, or *montrans de droit*, the prayer of which probably, as a matter of course, would have been at once granted. The Plaintiff states that he did in fact apply for such leave to sue the Crown, but not till after the case was in Court; and in the hope that a favorable answer would be received we have allowed the case to stand over for a considerable time. But we cannot grant indefinite delay, and we must now proceed to Judgment.

This particular suit, wanting the necessary leave, will therefore stand dismissed, with costs.

SUPREME COURT.

—

PROCÉDURE,—DEMANDEUR,—TRANSPORT DE SES DROITS A UN TIERS,—VALIDITÉ DU TRANSPORT

CONTESTÉE,—PRIX DU TRANSPORT NON MENTIONNÉ,—LE CÉDANT ET LE CESSIONNAIRE RÉUNIS TOUS DEUX COMME DEMANDEURS SUR LE "RECORD."

—

PROCEDURE,—PLAINTIFF,—TRANSFER OF HIS RIGHTS TO A THIRD PARTY,—VALIDITY OF THE TRANSFER CONTESTED,—PRICE OF THE TRANSFER NOT MENTIONED,—THE ASSIGNOR AND ASSIGNEE MENTIONED AS CO-PLAINTIFFS ON THE RECORD.

—

DHOTMAN & BRUGADA,—Plaintiffs,

Versus

D. JOMAIN,—Defendant.

—

Before:

The Honorable Mr. JUSTICE BESTEL, *and*
The Honorable Mr. JUSTICE COLIN.

—

Hon. V. NAZ,—of Counsel for Plaintiff.
V. DELAINÉ,—Plaintiffs' Attorney
E. GUIBERT,—of Counsel for Defendant.
F. ROBERT,—Defendant's Attorney.

—

12*th January* 1866.

In this case one L. Saintou had brought an action against the Defendant, Jomain, to recover the sum of $1,705 31c., balance of an account. After the Plaint had been served Dhotman and Brugada applied to be substituted to Saintou as Plaint ffs on the Record, in as much as they were the assignees of the claim of Saintou upon the Defendant.

This was assented to by the Defendant, under express reservations as to his rights when the case came on for trial.

G. GUIBERT, for Defendant, took exception to the transfer; it is a pledge, not an assignment; there is no price, no consideration mentioned.

HON. V. NAZ, for Plaintiff, argued: My clients are large creditors of Mme. Sainton, whom they might have sued as a "marchande publique." The husband, without binding himself, chooses to pay his wife's claims by transferring this claim to my clients; it is perfectly valid; the amount of my clients' claim on Mme. Saintou is not mentioned because it is not liquidated.

JUDGMENT.

The act of transfer is assuredly very ill drawn, but it every day happens that unliquidated claims over a succession, or an Estate, are sold or conveyed with or without warranty; such contracts are not only as binding and legal as any under the Codes, but are very useful to prevent expense and useless litigation. *E converso*, although here the price is not mentioned, there is no reason why, if Mme. Saintou owes money and the amount of the debt is not yet ascertained, Mr. Saintou should not pay that debt by transferring to creditors a claim of his own upon the Defendants. The strange nature of this document arises from this fact, that in contracts of every day's occurrence an unliquidated claim is sold for a price which is determined; here practically a price which is not determined, but may be, is to be paid by the assignees for a claim which is determined and assigned to them.

This is unusual but not *per se* illegal. In reality there is not much in the objection; the Defendant has already consented that the present Plaintiffs should be substituted on the Record to the original Plaintiff, saving his rights; and strictly speaking any defence he could offer against Saintou's claim may be opposed to the claim sued for by the Plaintiffs.

On the whole we think this action should go on, but we also think Saintou should remain a party to the cause; the transfer is of 1st May 1865, the action was brought on the 13th June, when Saintou was disseized, why did he bring the action when he had made over the claim? It may have been a private arrangement between parties but it appears strange that suddenly, on the case being defended, Dhotman and Brugada, who kept quiet since May, appear in the field as Plaintiffs instead of Saintou. Now the Defendant may have an interest to keep Saintou upon the Record; if he consented to allow the substitution it was with the express reservations of his rights, and we think Saintou should, under the circumstances, remain a party to this cause. If the case had been explained in Chambers the substitution would not have been granted as it is. We think it fair to all parties to have Saintou a co-Plaintiff, so that, if necessary, he may be examined on his personal answers.

The case shall be resumed as soon as notice of this interlocutory Decree has been given to the Plaintiff and to Saintou. We shall reserve the costs.

BAIL COURT.

—

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—VOL,—PROCÉDURE CRIMINELLE,—TÉMOIGNAGE,—ORD. NO. 35 DE 1852.

Le témoignage d'un accusé ne peut servir de preuve contre son co-accusé; mais lorsque la Cour pense que le Magistrat de District, en condamnant un accusé, ne s'est point basé sur le témoignage de son co-accusé, bien qu'il y fasse allusion dans son Jugement, ce Jugement sera maintenu.

—

APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE,—LARCENY,—CRIMINAL PROCEDURE,—WITNESSES,—ORD. NO. 35 OF 1852.

The statement of one prisoner is not evidence against another ; but when the Court was satisfied that the Magistrate below, in finding that one prisoner is guilty, though alluding to the statements of the other in his Judgment, had not gone upon those statements in convicting the other prisoner, this Judgment of the Magistrate was affirmed.

—

MOOTOO,—Plaintiff,

Versus

THE QUEEN,—Defendant.

—

Before :

His Honor the CHIEF JUDGE.

—

P. L. CHASTELLIER,—of Counsel for Plaintiff.
T. HERCHENRODER,—Plaintiff's Attorney.
S. J. DOUGLAS,—of Counsel for Defendant.
J. BOUCHET,—Defendant's Attorney.

—

21*st February*, 1866.

In this case one Ramdoyal, a Sirdar, in the employ of a planter in the district of Black River, was accused, before the local Magistrate, with stealing some sugar belonging to his Master, and one Mootoo, a shop-keeper at the mountain of Chamarel, was charged with receiving the sugar, knowing it to be stolen.

Both were convicted by the acting District Magistrate, and sentenced to 6 months' imprisonment with costs.

Mootoo appealed.

THE COURT : – The only question of law raised by Counsel here, is, that the statement of one of the parties accused is not evidence against the other. This is true ; but I am satisfied, on reading the Judgment of the Magistrate, that he did not proceed on this statement, and abundant evidence remains, if the Court were to go into that matter, to satisfy it that the Conviction of the learned Magistrate below is right and must be maintained.

The Appeal is, therefore, dismissed with costs.

—

BAIL COURT.

—

CONSTRUCTIONS FAITES SUR LE FONDS D'AUTRUI, —DROIT DU PROPRIÉTAIRE DU FONDS,—DESTRUCTION DES CONSTRUCTIONS OU INDEMNITÉ, —C. C. ART. 552.

Lorsqu'un tiers a construit sur le fonds d'autrui, le propriétaire du fonds a le droit ou de faire enlever les constructions par celui qui les a faites, et aux frais de ce dernier, ou de les conserver en payant l'indemnité fixée par la loi.

—

PROPERTY,—OWNERSHIP OF THE SOIL,—OWNERSHIP OF HOUSES BUILT ON THE LAND,—C. C. ART. 552.

When a party built houses upon land which is not his own, the proprietor of the soil may order them to be removed, and if he fails to do so, the proprietor of the soil may himself cause them to be taken down.

—

MALÉPA,—Plaintiff,

Versus

BELHOMBRE,—Defendant,

—

Before :

His Honor the CHIEF JUDGE.

—

E. DUPONT,—of Counsel for Plaintiff.
J. G. TESSIER,—Plaintiff's Attorney.
W. NEWTON,—of Counsel for Defendant.
W. HEWETSON,—Defendant's Attorney.

—

21*st February* 1866.

In this case, the Plaintiff sued the Defendant for payment of $500, as damages, for having been ejected by the latter, in the year 1862, from several buildings in the town of Port Louis, belonging to him the Plaintiff. The Plaintiff did not allege that he was proprietor of the ground on which the buildings stood ; on the contrary the Defendant produced a regular title of property of the ground on which the buildings were erected, and remained till they were demolished by him, the Defendant, in 1862.

From the evidence it appeared that the erections in question were clearly the property of the Plaintiff. He represented that many years ago, after buying the houses, he had taken steps to acquire the property of the soil also, but he produced no legal evidence that he ever became the owner, altho' he stated that he had paid two sums of $25 and $75 on that account, but the evidence of these payments to the person who was then the owner was defective.

The Defendant sent notice to the Plaintiff to quit in 1862, offering him $300 for the buildings, the Plaintiff refused the amount tendered as not being, in his opinion, adequate compensation for their value.

It was stated, in explanation of the delay in

raising the present demand, that since that time several suits, between the present parties, had run their course in the District Court, regarding the matters now in dispute, and that in all these cases the Plaintiff had been unsuccessful.

THE COURT : The law applicable to a case like the present is contained in Art. 552 of the Code and following sections.

The right of property in the soil, as every lawyer knows, carries with it all that is above or below the surface. Every erection or plantation on the soil is presumed to have been made by the owner and to be his property, "*si le contraire n'est prouvé.*"

"Lorsque les plantations, constructions et "ouvrages ont été faits par un tiers, et avec ses "matériaux, le propriétaire du fonds a droit ou "de les retenir ou d'obliger ce tiers à les enlever.

"Si le propriétaire du fonds demande la sup-"pression des plantations, elle est aux frais de "celui qui les a faites sans aucune indemnité "pour lui, il peut même être condamné à des "dommages et intérêts s'il y a lieu, pour le pré-"judice que peut avoir éprouvé le propriétaire "du fonds."

I am satisfied that the buildings were the property of the Plaintiff but erected on land to which he has not shewn any proper title of ownership. The Defendant has shewn such a title. He is therefore, under the above law, authorized to turn the Defendant out and to insist that he should remove the erections. The Plaintiff got notice to quit but refused to remove the buildings and the Defendant took them down. In all this the Defendant was within the law. I must therefore give judgment in his favor.

As to the matter of costs, although the Plaintiff has not been able to shew that he was in *bonâ fide* belief that he occupied the soil as owner, which, under a subsequent clause of the same article of the Code, would have brought him into a more favorable position, there can be little doubt that he paid a considerable amount to the authors or predecessors of the Defendant, with the view of acquiring the property of the soil.

I shall therefore give no costs.

SUPREME COURT.

SOCIÉTÉ POUR L'EXPLOITATION D'UNE PROPRIÉTÉ SUCRIÈRE.—INSOLVABILITÉ DE L'UN DES ASSOCIÉS.—ACTION EN DISSOLUTION DE L'ACTE DE SOCIÉTÉ.—C. C. ART. 1865.

PARTNERSHIP FOR WORKING A SUGAR ESTATE.—INSOLVENCY OF ONE OF THE PARTNERS.—ACTION FOR DISSOLVENCY OF THE CO-PARTNERY.—C. C. ART. 1865.

ODINET AND PERDRISETS,—Plaintiffs

Versus

V. GARREAU,—Defendant.

Before :

The Honorable Mr. JUSTICE BESTEL *and*
The Honorable Mr. JUSTICE COLIN.

Hon. H. KŒNIG,—of Counsel for Plaintiffs.
E. BOULLÉ,—Plaintiffs' Attorney.
Hon. L. ARNAUD,—of Counsel for Defendant.
J. PIGNÉGUY,—Defendant's Attorney.

12th January 1866.

This was an action brought by the Plaintiffs for the dissolution of the co-partnery which existed between themselves and Victor Garreau, the Defendant, and also to obtain an Order for the licitation of the *Beau Bois* sugar estate, belonging to the partners. It appears that Victor Garreau had become insolvent, and that the parties could not agree between themselves as to the mode and terms under which the co-partnery should be dissolved, hence the action.

HON. H. KŒNIG, for Plaintiffs : I prove, by the documents put in, that the Defendant is quite insolvent ; if this be the case the law allows the partners to dissolve the co-partnery, and as we cannot agree, we have been compelled to apply to the Court for a Decree.

HON. L. ARNAUD, for the Defendant:—I do not deny that there is evidence of Defendant's insolvency, but the real object of the Plaintiffs is to obtain, not so much the dissolution of co-partnery, but the licitation of the sugar estate which is the property of the partners.

JUDGMENT.

It is proved that the Defendant is insolvent ; *inter alia* his wife has, on that ground, obtained a Decree for a separation of property ; under Art. 1865 of the CODE CIVIL, the co-partnery may be dissolved and, as the parties did not agree as to the mode of dissolution, the Plaintiffs were entitled to come before this Court, and are now entitled to a Decree.

We have here no Order to make as to the sale by licitation of the sugar estate *Beau Bois* ; the co-partnery being dissolved, the Plaintiffs may be entitled to apply, in the proper way, and at Chambers, for the sale of the joint real estate ; but at the present moment we do not see any reason to grant an Order which may be the necessary consequence of our Decree or not, but which should be applied for in the proper manner.

Judgment for the Plaintiffs with costs, dissolving the co-partnery between Plaintiffs and Defendant ; the Court gives no Order as for the licitation prayed for.

SUPREME COURT.

—

ALIENS,—PRISE DE CORPS,—NATURALISATION,—PERMIS DE RESIDENCE,—ORD. No. 23 DE 1856 § 7.

Un étranger domicilié à Maurice, ayant rempli toutes les formalités requises pour se faire naturaliser sujet Anglais, sauf le serment d'usage, et n'ayant point de permis de résidence, a été déclaré passible de la contrainte par Corps pour dette civile.

—

ALIENS,—CAPTION OF THE BODY,—NATURALIZATION,—PERMIT OF RESIDENCE,—ORD. No. 23 OF 1856, § 7.

A foreigner domiciled in Mauritius was held liable to imprisonment on a judgment for debt, where he had not a permit of residence, and although steps had been taken for his naturalization as a British subject which only required for their completion that he should take the customary oath.

—

BAX,—Plaintiff,

Versus

MENON,—Defendant.

—

Before:

His Honor the CHIEF JUDGE, *and*

The Honorable Mr. JUSTICE BESTEL.

—

L. ROUILLARD,—of Counsel for Plaintiff.
E. DUCRAY,—Plaintiff's Attorney.
S. J. DOUGLAS,—of Counsel for Defendant.
H. BERTIN,—Defendant's Attorney.

—

9th March 1866.

The Plaintiff sued the Defendant on the following writing:

" Les soussignés, Lucien Bax et Maximilien " Menon, tous deux demeurant à Nossi Bé, " sont convenus de ce qui suit:

" L'arrangement intervenu entre les parties, " le premier Avril mil-huit-cent-soixante-un, in- " stituant M. Bax, sous des conditions détermi- " nées, administrateur de la propriété de Passan- " dava, appartenant à M. Menon, est annulé " d'un commun accord.

" M. Menon paiera à M. Bax le trente-un dé- " cembre mil-huit-cent-soixante-deux, la somme " de cinq mille huit cent trente huit francs con- " venu entre les parties et à forfait.

" Si Monsieur Menon arrivait plutôt à Mau- " rice ou la Réunion la somme deviendrait exigi- " ble un mois après son arrivée, sans cependant " que cette échéance puisse arriver avant le " trente Juin 1862.

" Fait double à Nossi Bé le dix-sept Décembre " mil-huit-cent-soixante-un.

" Approuvé l'écriture,

" (Signed) LN. BAX."

" Approuvé

" Et bon pour cinq mille huit cent trente huit " francs,

(Signed) " MENON."

The Defendant admitted the debt, and that his domicile being in Mauritius he had nothing to oppose to the jurisdiction of this Court. The only point made by his Counsel was that, upon the judgment which must pass on this demand, caption of the body could not issue. Counsel contended that his client, though a foreigner, was not within the class of Aliens designated in the Ordinance No. 23 of 1856 as liable to imprisonment upon condemnation for a Civil or Commercial debt.

The Section of the Ordinance referred to (§7) runs in those terms:

" All judgments recorded at the suit of a Bri- " tish subject against an Alien not authorized to " reside in the colony, shall import arrest of the " body in execution, without distinction between " civil and commercial debts."

The Counsel for the Defendant admitted that his client had not a special authority to reside in the Colony, but he stated that he had, in the year 1856, presented a petition to the Government to be naturalized a British subject, that the Ordinance for this purpose had passed the Legislature, and been approved of by Her Majesty, and that the only formality required for the completion of the naturalization was that the Defendant should appear before the Governor and Council to take the customary oath; that therefore his client had been, in point of fact, authorized to reside in the Colony, and was not liable to imprisonment under the above law.

THE COURT: In the case of *Laurent v. Bareillier* (29th Sept. 1864, PISTON'S *Reports*, Vol. IV, p. 101) we had occasion to go fully through the laws regulating questions of this description, and it is unnecessary to resume the subject minutely in this case.

We were satisfied, in the case referred to, on a review of the whole of the law on the subject, that the Section of the Insolvency Ordinance of 1856 applies to all Aliens who have not yet a positive permit of residence in the colony; now the Defendant here admits that he has not obtained such a permission. No doubt he says that he has got an equivalency, *viz*: the proceedings in 1856 referred to by his Counsel, taken in the view of his obtaining naturalization as a Bri-

tish subject. But unfortunately those proceedings were never brought to a conclusion; we can only deal with them as inchoate and incomplete. Indeed, in the Ordinance for naturalization, it is positively declared that the rights and privileges asked for by the petitioner shall be confirmed only "on his (the petitioner) pre- "viously taking and subscribing, before the Go- "vernor in Council, the oaths and declarations "by law prescribed in the naturalization of "Aliens."

Now this has not been done. It is a condition precedent of the object which was desired by Mr. Menon, and the condition not having been fulfilled we cannot hold that the proceedings have ever reached maturity for any effect whatever.

We therefore think that the Defendant is within the article of the Insolvency Ordinance of 1856; and the Judgment, in this case, must issue with costs and for caption of the body limited, as usual, to three years.

BAIL COURT.

—

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—VOL AVEC EFFRACTION,—PROCÉDURE CRIMINELLE,—ORD. No. 35 DE 1852.

Le Magistrat de District n'est point compétent lorsqu'il s'agit de prononcer une peine au sujet d'un vol accompagné d'effraction ou de blessures graves; mais il faut que l'effraction ait été faite à une maison principale; l'effraction de boîtes ou d'armoires ne suffirait point pour rendre le Magistrat incompétent.

—

APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE,—LARCENY ATTENDED WITH BREAKING, —CRIMINAL PROCEDURE,—ORD. No. 35 of 1852.

To exclude the jurisdiction of the Magistrate in cases of larceny accompanied with serious wounds and breaking, the breaking must be into a main building; forcibly opening boxes or presses will not suffice.

—

GOVINDEN,—Appellant,

Versus

THE QUEEN,—Respondent.

—

Before:

His Honor the CHIEF JUDGE.

—

H. WILSON,—of Counsel for Appellant.
E. LALANDELLE,—Appellant's Attorney.
S. J. DOUGLAS,—of Counsel for Respondent.
J. BOUCHET,—Repondent's Attorney.

—

, 1866.

This was an Appeal from a Judgmemt of the Magistrate of the District of Flacq, sitting on the Criminal side.

The Appellant was accused of stealing, from the residence of the person in whose domestic service he was, a gold necklace of 56 half sovereigns, a shawl and a piece of silk cloth. In the Charge theft was stated to have been committed over night and by breaking a box in which the articles or at least the necklace was enclosed.

The accused was convicted and sentenced to 12 months imprisonment and costs.

In the Appeal it was argued that the Magistrate had exceeded his jurisdiction and § 102 (18) of the District Court Ordinance No. 35 of 1852 was referred to, which runs thus: "No "District Magistrate shall have jurisdiction in "the following matters as enumerated and de- "fined in the Penal Code of the colony." "Lar- "ceny, if attended with serious wounds or break- "ing into a main building."

THE COURT:—The Section of the Ordinance referred to does not apply. In the present case there is no charge of breaking into the main house. The only charge of breaking relates to a box in the house in which the most valuable por tion of the stolen property was usually preserved.

The Appeal is dismissed with costs.

COURT OF BANKRUPTCY.

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BAIL,—CLAUSE RÉSOLUTOIRE.—DÉFAUT DE PAIEMENT DU PRIX,—ACTION EN RÉSOLUTION DE BAIL,—INTERVENTION D'UN TIERS,—PAIEMENT, —SUBROGATION,— PREUVE TESTIMONIALE,— C. C. ARTS. 1236 ET 1184.

Une obligation peut être acquittée par un tiers qui n'y est point intéressé, pourvu que ce tiers ne soit pas subrogé aux droits du créancier.

La Cour a décidé que bien qu'il ait été stipulé dans un bail qu'à défaut de paiement du prix, après un certain délai, le bail serait résolu ipso jure *et sans autre formalité, le locataire avait le droit, bien qu'il n'eût point payé dans le délai voulu, d'être entendu par la Cour; et le locataire ayant établi qu'il avait fait, dans le délai voulu, des offres verbales qui n'avaient point été exécutées par la faute du bailleur, le bail a été maintenu.*

—

DEBTOR AND CREDITOR,—PAYMENT,— ASSIGNMENT OR SUBROGATION,—LESSOR AND LESSEE, —RENT,—CLAUSE OF ANNULLATION OF THE LEASE FOR NON PAYMENT OF THE RENT,—ORAL PROOF,—C. C. ARTS. 1236 AND 1184.

A creditor is bound to accept payment of his debt from any one, even a third party offering the same, provided no subrogation or assignment is asked.

Where in a lease of land it was expressly stipulated that on failure to pay the rent due, after a certain fixed delay, the lease should be annulled ipso jure, *without any further ceremony, it was held that though the rent had not been actually paid within the stipulated period, the tenant was entitled to be heard before losing possession, and it being shewn that payment had been verbally offered in good time, if the landlord would send a receipt, which was not done, it was held that the lease was not annulled.*

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CRÉDIT FONCIER OF MAURITIUS,—Plaintiffs,

Versus

DHOTMAN & UX,—Defendants.

In re:

CESSIO BONORUM OF THE HEIRS LANOUGARÈDE.

—

Before:

His Honor the CHIEF JUDGE—*Commissioner.*

—

HON. L. ARNAUD,—of Counsel for Plaintiffs,
J. PIGNÉGUY,—Plaintiffs' Attorney,
A. LEGALL,—of Counsel for Defendants,
E. DUVIVIER,—Defendants' Attorney.

—

23*rd April* 1866.

This was a Rule obtained at the instance of the "Crédit Foncier of Mauritius Limited," in the matter of the consolidated Cessio Bonorum of Widow Eugène Bazire & Ors, the heirs Lanougarède, calling upon Mr. Dhotman & Ors to shew cause why the said "Crédit Foncier" should not be authorized to pay into Court the sum of twelve hundred dollars, *plus* any costs claimable by Mrs. Dhotman, for twenty-four months' rent, up to 16th November last, of a plot of ground situate in the district of Flacq, at the place called "Le Camp de Masque," leased by her to the late Mr. Victor Lanougarède & Ors, by a notarial deed of date 30th November, 1859, and why, such payment being made into Court, the said Mrs. Dhotman should not be ordered to stay the proceedings by her instituted against the heirs of the late Mr. Lanougarède and Ors.

The facts were as follows: On the 30th November, 1859, a regular notarial lease was passed between Mrs. Dhotman (duly authorized by her husband), the proprietress of a piece of ground at Flacq measuring about 200 acres, and the late Mr. Victor Lanougarède and certain other parties. The lease was to endure from the 16th November, 1859, till the 7th March, 1867, and the rent was fixed at $50 per month, payable by the lessees jointly and severally every six months, running from the said earlier date.

Among other clauses the act of lease contained the following stipulation:—

"It is expressly agreed between the parties as an essential condition of the lease, that in case of payment of 6 months' rent not being made within 3 months after expiry of the 6 months, the present lease shall be annulled of plain right, if the lessor shall so please, without any other formality than a single notice to pay, after which the lessor shall put herself in possession of the land now let, as it shall then stand, without losing her recourse against the lessees for the past rents, and for any damages to which she may think herself entitled."

On the 16th November, 1865, two years' rent remained unpaid. The next period of 3 months terminated on the 16th February last. Certain communings took place on the subject of paying the arrears of rent, and it was established, by evidence adduced at the trial, that on the 2nd or 3rd March last, Mr. PIGNÉGUY, Attorney at Law acting for the Crédit Foncier of Mauritius, intimated verbally to Mr. Dhotman, representing the proprietress of the land, that his clients were ready to pay the rents due, whatever they might be, and offered to give a cheque for the amount. Mr. Dhotman referred Mr. PIGNÉGUY to his Attorney, Mr. DUVIVIER, in whose hands he stated the papers then were. Mr. PIGNÉGUY subsequently made the same offer to Mr. DUVIVIER, who said he was examining the papers.

Two days thereafter, *viz.*, on the 6th of March, the proprietress caused a *mise en demeure* to be served upon the tenants and their representatives, setting forth that if the sum of $1,200 of rents, due at the said date of 16th November last, was not paid within 24 hours, the lease would be *de plano* cancelled, in terms of the above clause in the contract.

The money not being paid on the 8th March, the lessor formally called upon the tenants to attend on the 12th of the same month, on the ground itself, and then and there to give the land over to her that she might enter upon and enjoy the possession thereof for the future.

On the same day, *viz.*, the 8th, the money was sent to Mr. DUVIVIER, by the Ceylon Company Limited, the Sequestrator on the Estate, but he returned it stating that he could not receive it. The present proceedings were then taken in Court to stop the proprietress resuming possession of the land; and the money was consigned in the hands of the Registrar.

A. LEGALL, for Dhotman: I gave ample time for payment of the rents. In fact I allowed arrears to accumulate for more than two years, and I only resorted to the steps authorized by the lease when I could not get payment. The offers made by Mr. PIGNÉGUY were not "offres réelles," as regulated by the Code, and those were

the only ones which I was bound to accept, and while he talked of payment he never actually paid me. I do not admit the right of the "Crédit Foncier," or the Ceylon Company, to intervene here. They are strangers to me and are not parties to the lease.

In the cases of lease like the present, the Courts in France have rigorously enforced the resolutory clauses. See S. 11.2.119 : (Liège) DUVERGIER—VOLUME 1, No. 495 : TROPLONG "*Louage.*" II. 321. The time for payment was past. I had a right to resume possession. The Court can't interfere with that right.

HON. L. ARNAUD, for the "Crédit Foncier," and also the assignees of the Insolvent estate of the Heirs Lanougarède :—I only ask to exercise my debtors' rights here, and I wish to avoid the penal forfeiture which is, I submit, too sharply pressed against me by the other side.

In all cases of this description, a Court of Justice must intervene between the parties, and take cognizance of the facts, before giving effect to so rigorous a penal clause. DALLOZ Répertoire, "*Louage,*" No. 540.

The authors of the law clearly understood this, as any one will see who takes the trouble to look into the preliminary discussion on this Chapter of the Code.

The case from the Court of Liège is really the only case against me. It was very special in its circumstances and is quite counterbalanced by the other Decisions of the French Courts. See them collected under Art. 1729, C. C. in GILBERT'S "Codes annotés." The facts here are all in my favor; Dhotman was informed, from the first, that he was to be paid off. But he hung back, he sent no note of the amount which would at once have been remitted to him and within two days after he had served us with a summons.

CHIEF JUSTICE.—Two questions have been raised in the course of the discussion at the bar, the one of a preliminary or prejudicial nature, the other one on the merits of the present dispute. As to the first point, it does not appear to me that the objection which has been taken to the right of the "Crédit Foncier" and "Ceylon Company" to intervene in this case can be sustained.

The offer of payment was made by parties or on account of parties who are creditors of the late Mr. Victor Lanougarède, and as such are directly interested in the Estates of Mrs. Widow Bazire and others, the heirs of that gentleman. But further, the parties tendering payment of the rents in arrear, and who have actually paid the money into Court, do not ask any subrogation or assignment of the claim of the landowner Mrs. Dhotman. In that state of matters, by a well known rule of the Code, the creditor is obliged to accepted payment by whomsoever tendered, if there is no other legal bar or objection to his doing so :—

"Une obligation peut être acquittée par toute "personne qui y est intéressée, telle qu'un co-"obligé ou une caution."

"L'obligation peut même être acquittée par "un tiers qui n'y est point intéressé, pourvu "que ce tiers agisse au nom et en l'acquit du "débiteur, ou que, s'il agit en son nom propre, il "ne soit pas subrogé aux droits du créancier." C. C. Art. 1236.

Even therefore if the parties who offered payment and have consigned the money in the hands of the Registrar were altogether strangers to the affairs of the succession Lanougarède, Mrs. Dhotman must accept payment made in this way as a discharge of her claim for rents in arrear, but this always on the assumption that, in law and in the state of matters actually existing in the present inquiry, she was bound *aliunde* to accept payment of those rents and so lose her right of cancelling the lease which she contends, is open to her from the default of the tenants to pay the rents at the terms stipulated in the written instrument of lease itself.

This is the second and the main inquiry in the present case. On the one hand the proprietress contends that the rents not having been paid at the terms stipulated the resolutory clause of the lease has come into operation, and she is entitled immediately to re-enter on the land with all its crop upon it. On the other, the tenants, or those in their right, maintain that the rent was offered in due time, and that the payment actually made, though refused, was sufficient to stop the effect of a clause so highly penal, and purge the irritancy of the lease which might otherwise have been incurred.

The question, it will be readily be perceived, is one both of considerable interest and importance.

The Court may be permitted to examine in some detail the points which have been raised by the learned Counsel.

Discussions similar to that in the present case have frequently occurred in France, where the law on the subject is the same as in this colony, *viz*: the Civil Code. Now, in that system, contrary to the other rules of the Roman law, which prevailed in a large portion of the Kingdom of France prior to the promulgation of the Codes, a resolutory condition, *i. e.* a condition which resolves or annuls the contract is held to be embodied in all mutual agreements. The effect of this legal principle is that if one of the parties fails to perform what he has undertaken, the other may in his option insist on his performing his obligations or may claim the dissolution of the agreement with any damages which he may have sustained. But the law goes on to say that the contract does not, as it were, dissolve itself. The annullation must be demanded in a Court of Justice, and a certain further enlargement of the time may be accorded by the Court, to the party who has failed to perform his portion of the agreement, according to the Judge's appreciation of the circumstances of the particular case. All this is clearly stated in Art. 1184 of the Code :

"La condition résolutoire est toujours sous-"entendue dans les contracts synallagmatiques,

" pour le cas où l'une des deux parties ne " satisfera point à son engagement.

" Dans ce cas, le contrat n'est point résolu de " plein droit. La partie envers laquelle l'enga- " gement n'a point été exécuté, a le choix ou de " forcer l'autre à l'exécution de la convention, " lorsqu'elle est possible, ou d'en demander la " résolution avec dommages et intérêts.

" La résolution doit être demandée en justice, " et il peut être accordé au Défendeur un délai " selon les circonstances."

Such is the general law on the subject of resolution of mutual contracts on the ground of non-performance of his obligations by one of the covenanting parties. But in the case with which we are now dealing, it must be remarked that we have a very special and very stringent clause of nullity in the lease itself. It runs in these terms:

" Il est expressement convenu entre les par- " ties, comme condition essentielle des présentes:

" 1o. Qu'à défaut de paiement, de la part des " preneurs, d'un semestre du loyer ci-dessus " stipulé, et ce dans les trois mois qui suivront " son échéance, le présent bail sera résilié de " plein droit, si bon semble à la bailleresse, sans " aucune autre formalité qu'une simple mise en " demeure, après laquelle la dite bailleresse " pourra se faire mettre en possession du terrain " présentement loué, tel qu'il se trouvera alors, " mais sans cependant perdre son recours contre " les preneurs pour raison des loyers échus et " pour tous dommages intérêts qu'elle croirait " devoir leur réclamer."

It is therefore necessary that we should enquire what is the effect in law of such a special convention. Does it add anything to the Common Law rights, if we may use the expression of the lessor, in a case like the present, or does it leave matters, between the contracting parties, substantially in the same position as if there had been no particular clause of this description inserted in the lease itself?

It appears to me that if there is a difference between the case ,when there is no special clause, we might expect that that difference would manifest itself chiefly in relation to two points, *viz*: the necessity of resorting to a Court of Justice, before the lessor could resume possession, and secondly, if the lessor must resort to a Court the power of the Judge to grant a delay to the lessee in fault, before declaring the lease forfeited or annulled.

Let us examine the two questions. As to the necessity of the intervention of a Court of law to declare that the forfeiture has taken place, there does not appear to be much difficulty in affirming the necessity, in most cases, of a resort to a Court of Justice, as well when there is such special clauses as when, there being no special clause, the parties find themselves under the general law of Art. 1184 of the Code.

In truth, when we consider the position of parties attentively, under such a special clause, we shall find that, practically, it would be a very difficult thing to dispense, in almost any case, with the investigation of a Judge, except where the tenant voluntarily gives up possession.

At first sight it might be plausibly said the parties to the lease have agreed that if the rent is not paid by a certain day, or on a certain notice to pay, the contract shall be annulled *ipso jure*, and the lessor, without any further ceremony, shall re-enter into possession. The contract is a lawful one, the parties had the right of making any arrangement they pleased, they have done so. How then, seeing that the rent has not been paid at the term stipulated, should there be any difficulty as to allowing the lessor to resume at once the possession of his own property? Why should he incur the delay and expense of resorting to a Court of Justice when he and the tenant had specially agree, that, in the event occurring, which has now really happened, he should at once and without any formality take possession of the land?

But then the question of whether the rent has or has not been paid by a certain day is a matter of fact, and if this is disputed, how can it be determined but by a Court of Law? It will not do to say, the rent has not actually been paid at the stipulated term, and the lease itself covenants that the rent should be paid on a certain day, or on a certain warning to pay, and failing such payment the tenant's right shall be at once forfeited. Very true, but while the tenant may admit that the rent was not paid down on the day stipulated he may say that this was owing to " force majeure, " to circumstances over which he had no control, for example to his not being able to find the lessor, who purposely kept out of the way; or the lessee may say that the delay in paying arose from some innocent mistake or mere oversight for which he cannot be visited with the heavy penalty of the forfeiture of his lease.— At all events, he insists on being heard, before he is turned out. This request can scarcely be denied to any man who has serious pecuniary interests at stake. Indeed, to refuse a hearing in such a case might lead to very unjust consequences, and probably, in some instances, to breaches of the public peace. Accordingly it is thought that it may safely be laid down, as a general proposition, that even when there is a special clause as in the present lease, declaring that in the event of the rent not being paid by a certain fixed day, the contract shall be annulled of plain right, without any other formality than a simple notice to pay, the tenant may nevertheless insist that he shall be heard by a Judge, and that the forfeiture shall be declared by a Court of Justice, before he can be compelled to cede possession. So much for the first of the two questions.

Let us now consider the second. What are the powers of the Court in granting indulgence to a tenant who has allowed the term of payment of his rent to elapse; under a lease containing a special clause declaring that if the rent is not paid by that fixed term the contract shall be annulled of plain right and the lessor shall resume possession of his subjects?

In such a case it is plain that the Judge's power is much restricted. We do not find ourselves any longer under the provisions of Art. 1183 of the Code. The Court has not to deal with a lease in which a clause of annullation is understood to be in law embodied. There is a special clause in the lease itself.— The Court has no authority therefore to grant time or a fresh term to the tenant, as it would if there had been no special clause, and if the circumstances had, in the opinion of the Judge, been favorable to the tenant. To grant such a delay would be to make a new contract for the parties which a Court of Justice has no authority to do.

It must cause the contract to be executed, as it stands, but of course looking carefully at what the real facts of the case are, and keeping in view the position in which the parties actually stand towards each other on the facts which may have been ascertained in evidence.

Now, in the first place, it must be remembered that, in the present case, the tenants, or those in their rights or offering payment of the arrears, do not ask any further delay to pay the rents due to Mrs. Dhotman. In point of fact, as we have already seen, those rents were paid within 48 hours of the stipulated term. This, according to the Rule of the Civil Law would be sufficient performance, for PAUL tells us that: *nihil ex obligatione, paucorum dierum mora minuere* ; and Mr. President TROPLONG appears to approve of the maxim as a sound one in this modern law of France, for he thus writes :

" Les Juges ne doivent pas voir, en thèse générale, une cause suffisante de résiliation dans un retard de peu de temps. Ils se rappelleront le conseil du jurisconsulte PAUL" which we have just quoted. " *Louage* " No. 320. I should not be willing however to rest the judgment in the present case upon this principle which is not altogether consistent with our modern ideas of the promptitude and accuracy necessary in the performance of contracts. I lay the maxim the more readily aside as the Decision may be made I think to stand on firmer and surer grounds.

It will be recollected that several days before the lapse of the time stipulated in the lease, within which the rents were to be paid, and before any *mise en demeure* was served, an offer of payment was twice made to those who were acting for the proprietress. They had therefore nothing to do to get their money but to present a receipt to Mr. PIGNÉGUY, containing the exact amount of the rents then in arrear. They did not choose to do so. They remained passive till the term of payment was past, and they then demanded the forfeiture of the tenants, right and the posession of the land with all the crop upon it. In the circumstances, can it be fairly said that the tenants failed in their obligation as to the payment of the rent. I think this cannot be maintained. The money was offered verbally, it is true, both in good faith and in good time, all the lessor had to do was to send a receipt and get payment.

Now it is the duty of a creditor to whom money is payable to be ready with a receipt stating the sum that is due to him, and the debtor is entitled to ask for this in exchange for his money. Mrs. Dhotman's advisers were not ready with their receipt. They never presented one for payment though they were invited to do so.

In such a state of matters I do not think that she can with justice say that her tenants have failed to pay the rent as stipulated. I do not think that she can take advantage of the passive attitude which she assumed and insist for a forfeiture of the lease and a resumption by herself of the possession of the land.

I have had an opportunity of going through the French authorities on questions resembling the present, and I am satisfied that, on the whole, the above views are consistent with the weight of authority in France both of decided cases and of the leading authors. No doubt there are authorities which, at first sight, appear to point the other way. But when we look beyond the rubrics, and consider the cases in all their details, we will find that much of this apparent difference really disappears. For example, at the discussion of the case I was very much pressed with the Decision of the Court of LIÈGE, 1st August 1810, S. 11, 2, 119. The Judges there found, as the rubric bears, that: " Lorsque, dans " un contract de bail, la résolution a été stipulée " en termes exprès, à défaut de paiement des " loyers, le contrat est résilié par le seul fait de " non paiement dans le délai fixé. Dans ce cas " le bailleur n'est pas tenu à demander la résolu- " tion en justice." On reading however the Report itself, it will be found that there were facts making the case clearly distinguishable from the present. One of the grounds of the Decision of the Court of Appeal, in affirming the judgment below, was : " Attendu que rien ne prouve " que l'Appellant ait offert, avant ce commande- " ment, de payer les échéances du fermage, ni " qu'il lui était impossible d'effectuer les dits " paiements ; met l'appellation au néant, &c." Now in the case at present before the Court such offers were really made, and accordingly the authority quoted becomes in reality a Decision in favor of the views to which the Court has given effect, for it is plainly implied, in the Judgment of the Court of LIÈGE, that if offers of payment had been made, the Decision would have been different.

It is also obvious that recourse to the Court of Law was unavoidable.

The Rule is therefore made absolute. The " Credit Foncier of Mauritius Limited " is authorized to pay into Court the sum of $ 1.200, being 24 months rent, up to the 16th November last ; and the proceedings instituted by Dhotman the wife against her tenants and those in their rights are hereby stayed ; the costs of the said Dhotman the wife up to the 8th March last to be paid by the said " Credit Foncier " as has been all along offered.

No other costs.

SUPREME COURT.

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VENTE DE SUCRES,—USAGE COMMERCIAL,—RÉGLEMENTS DE LA CHAMBRE DE COMMERCE,—PERTE DES SUCRES APRÈS LE DÉLAI POUR PRENDRE LIVRAISON.

La Cour Suprême a jugé, d'après l'usage commercial et les réglements de la Chambre de Commerce de cette Colonie, que celui qui achète des sucres doit, à moins de conventions spéciales, en prendre livraison dans un délai de quinze jours à dater du jour de la vente; faute par lui de le faire dans ce delai, la vente ne peut plus être résolue à moins qu'il ne prouve une différence de 50 *c. au moins par cent livres entre l'échantillon de vente et le sucre vendu; et la perte des dits sucres, si elle a lieu après ce délai, est pour compte de l'acquéreur, à moins qu'il ne prouve que c'est par la faute du vendeur qu'il n'a point pris livraison dans le dit délai.*

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SALE OF SUGARS,—USAGE OF TRADE,—CODE OF PRACTICE,—LOSS OF THE SUGARS AFTER THE USUAL DELAY TO TAKE DELIVERY.

The Supreme Court has ruled, in accordance with the usage of trade and the Code of Practice of the "Chambre de Commerce" of this place, that the purchaser of Colonial Sugars is bound, except in cases of private agreements, to take delivery thereof within a delay of 15 *days from the day of the sale, after which delay the sale cannot be cancelled except when the buyer establishes a difference of at least* 50 *c. per* 100 *pounds of the good sold compared with the selling sample; and the Sugar shall be at the risk of the buyer unless within that delay he shall have claimed delivery and the delay shall thus be proved to have been caused by the seller.*

—

CEYLON COMPANY,—Plaintiffs,

Versus

CHAUVIN,—Defendant.

—

Before:

The Honorable Mr. Justice BESTEL, *and*
The Honorable Mr. Justice COLIN.

—

The HON. V. NAZ,—of Counsel for Plaintiffs.
W. HEWETSON,—Plaintiffs' Attorney.
S. J. DOUGLAS,—of Counsel for Defendant.
E. LECLÉZIO,—Defendant's Attorney.

—

12*th January* 1866.

In this action the Plaintiff alleged that on the 16th, 19th, and 20th day of December 1864, they had sold to Jules Chauvin, the Defendant, several parcels of sugar, marked "*Plaisance*, Hart, de Bissy & Co.," forming together a quantity of 4,118 bags of sugar; that on the 19th day of January 1865, they again sold another parcel of sugar, marked "*Richemarre*, Hardy & Co."; that the said sugars were sold at the prices mentioned in the account annexed to the Plaint, and upon the usual conditions between merchants in Mauritius, and especially under the condition that the purchaser of the said sugars was bound to take delivery of the same within the time prescribed by the usage of trade in Mauritius, and that, in default of so doing, the purchaser would be bound to pay the approximative value of the said sugars, and be liable of all risks and accidents which might happen to the goods sold; and further that, in default of taking delivery of the said sugars as aforesaid, the said purchaser would have no right to obtain any reduction for any difference in the samples, unless the said difference would exceed in value one shilling per one hundred pounds weight of sugar. The Plaintiffs further alleged that, although orders for the delivery of the aforesaid sugars were duly handed over to the said Defendant, he, the said Defendant, neglected to take delivery of all the sugars aforesaid within the time agreed upon and prescribed by the general usage of trade, and long after the time for such delivery had expired, to wit: on or about the 12th of February 1865, three lots or parcels of the sugars marked *Plaisance, Hart, de Bissy & Co.*, sold to the Defendant as aforesaid, and forming together 999 bags of sugar, and the lot or parcel of sugars marked *Richemarre, Hardy & Co.*, sold to the Defendant as aforesaid, were lost or damaged in the stores in which the said goods had been warehoused, during the flood which took place in Port Louis on the last mentioned day. The Plaintiffs further alleged that the Defendant neglected or refused to take delivery of another parcel of 316 bags of sugar marked *Plaisance, Hart de Bissy & Co.*, sold to him as aforesaid, at the price of $ 5.25 per hundred pounds weight, and still, though requested, refused to do so.

The Plaintiffs therefore brought their action to recover from the Defendant: 1st—the sum of $ 6,769.44 c. being the value of three lots of sugar marked *Plaisance, Hart de Bissy & Co.*, sold to him as aforesaid, and forming together 999 bags sugar;—2dly—the sum of $765.44 c. being the value of one lot of 151 bags of sugar marked *Richemarre, Hardy & Co.*;—3dly the sum of $2,073.75 c. being the value of one lot of sugar or 816 bags, marked *Plaisance, Hart de Bissy & Co.* the whole sold to Defendant as aforesaid, and the said three sums making together the sum of $ 9,608.63 c. with interest at 12 o|o.

To the Plaint were annexed separate accounts showing morefully the parcels sold, and those for which payment is now sought to be enforced. The Defendant gave notice of defence, and this being a commercial cause pleaded orally.

Witnesses were called on both sides, after the Hon. V. NAZ, for the Plaintiffs, had opened his case, and Messrs. Arbuthnot, Manager of the

Ceylon Company, and Js. Chauvin, Defendant, were heard on their personal answers, and

S. J. Douglas, for Defendant, argued: All the sugars, the payment of which is now claimed, are alleged, except 316 bags *Plaisance* sugar, to have been put in the stores of the Passage Monneron. The 316 bags now lost are alleged to have been purchased by Chauvin, rejected by him after the delays, contrary to the customs of the sugar trade, and part of the demand is to get payment of this.

It is necessary to distinguish the several lots.

All the *Plaisance* sugars were sold on the 19th December 1864, the delivery order is of the 21st December 1864.

The lots are 774 *Plaisance*
98 do.
127 do.
177 do.
139 do.

The four smaller lots have been called the 4 "petits lots," they amount to 541 bags. The 316 bags now lost in the inundation are the two last of the small lots. The lot of *Richemare* sugars, alleged to have been lost in the inundation, were sold subsequently; the delivery order is dated 28th January 1865. According to the ordinary law of the land, by Art. 1585 Code Civil, we should not have been bound; the warehouseman is the agent of the vendor; the stores of the Albion Dock were in the custody of the vendors, and the sugars were not transferred in the purchaser's name.

It is true that we agreed to be bound by the stipulations of the Code of Practice. But of that Code of Practice Art. 32 only is applicable to us. Stipulation is there made as to the mode of settling and adjusting differences of quality, nothing is said as to the rejection of sugars when delivery is being taken, and the sugars taken back to the stores without any claim being made by the vendors. The practice of the Ceylon Company is to have a clerk at the delivery; a sworn weigher makes delivery for the Dock, therefore for the vendor; he is the agent of the vendor, and notice of rejection to him is notice to the vendor. As to the rejection of the 316 bags, there is a direct conflict of evidence, but the witnesses agree that they were delivered at the end of December, and again tendered for delivery in March; the Ceylon Company say that they were first rejected in March, and had not been absolutely rejected in December. This cannot be, the sugars were first rejected in December; Ryder and Béguinot say so distinctly. Chauvin shows, by his notices, that he refused to go to arbitration; also we find that in February Arbuthnot writes to Chauvin, (1st Feby), he speaks then of sugars having been rejected; this must have been in December for there were but two rejections, December, March. There is more: Durocher says that when sugars have been weighed and are merely sent back to the stores for another occasion, they are sent back and stored in the name of the purchaser. If such be the case we have nothing to do with the 541 bags of sugar.

As regards the *Richemarre* sugars, the delivery order is of the 28th January and the sugars were asked on 9th February. The date of the delivery order is the *terminus à quo* of the fifteen days given by the practice.

I now come to the largest lot, 774 bags of *Plaisance* sugars. I admit we have not claimed delivery of those sugars within the time, but I have a good deal to say as to those sugars, and that will apply to all the sugars lost in the inundation. The rule of the Chamber of Commerce should be applied with good faith on the part of the vendors. The risk contemplated is the *ordinary* risks; no *extraordinary* risk is contemplated, and if any arise the loss is for the vendors.

The *Plaisance* sugars were presented at the time of the sale as being in a bonded warehouse; that is a place known to be secure, for it cannot be licensed as such without a certificate. I knew then that they are not liable to ordinary risks; the purchaser has not been fairly dealt with, he was led to suppose the goods were in a bonded warehouse. The owners of those stores knew they were not safe, and their apprehensions were justified by the event; that risk was not contemplated at the time. But is there proof that those sugars were really in the Passage Monneron stores? Is it not a remarkable fact that every individual store of the Albion Dock had its own book kept for each store, and we are told that, for these stores, there was not any book at all! There are two clerks to those stores; one is here, and he has not been called as a witness, the other cannot be believed. There were *Plaisance* sugars also at the Trou Fanfaron stores; why should Chauvin suffer from the loss of sugars damaged at the Passage Monneron stores? The license of the Albion Dock was produced, and there we find the numbers of the stores, and their situation; Nos. 14, 15, 16, 17 are at Trou Fanfaron; in the Dock Warrant which attracted my attention we read: Received in stores, 14 to 17; they are at Trou Fanfaron; but above is written, 2 and 3 Passage Monneron; that entry should have been made under, not above, if true. Receipts are not shown, since sugars were at Passage Monneron, others at Trou Fanfaron; the clerk of the store is not here, the only evidence as to identity is not to be believed, and such identity is not sufficiently proved.

The Hon. V. Naz, in reply:—The rule of trade is a favour to the purchaser; the Court was asked to single out the 4 small lots, I shall ask the Court to look at the delivery orders B. Nr. 1 and C. Nr. 1. Harel's evidence, as to the weighing, is confirmed by Ryder himself, and Charron proves how the sugars were sent to the Wharf. The 4 lots could not be rejected, for the lot of 98 bags, and that of 127 bags were never weighed at all, never removed from the Dock. Ryder does not speak the truth when he says the sugars were rejected in December. As to Arbuthnoth's letter, in February, he complains in it that the sugars were rejected without delivery taking place. Chauvin could not reject the whole lot, he could only reject the portion that did not agree with the sample. The rejection was wrong and could not be admitted. Chauvin never said a word to the effect that he

rejected the sugars, until part of the sugars were lost by the flood. After the alleged rejection he writes that he will take the sugars if similar to sample. The sale can only be cancelled if the difference amounts to 25 cents; the arbitrators decide it does not amount to that. Durocher's evidence is not such as the other side would make it out to be; the facts are quite different; here the delivery order was not handed back to Arbuthnot. As to the 151 bags of *Richemare* sugars, the delivery order cannot be the *terminus à quo*; even if it were, Chauvin is wrong, and did not apply in time; a delay of 15 days covers all risks.

We now come to the largest lot; it is admitted it was never asked at all; the Defendant says he was deceived because the Albion Dock, which was licensed, ought not to have been licensed; but the vendors had not to look beyond the license; if the Dock had stores which were improperly licensed, we have nothing to do with this; the Dock people may be liable to a fine, but we have nothing to do with it.

As to the identity, it is complete; compare the Dock warrants, the accounts and the orders; Charron compared the sugars at Passage Monneron stores with his general store book, there is not the slightest reason to believe that the sugars lost were in the Trou Fanfaron Dock.

JUDGMENT.

This case does not appear to us to be difficult of solution, although it has assumed large proportions, and many more witnesses were called than the elucidation of the issues really required.

The Defendant Jules Chauvin appears to have bought from the Plaintiffs, on the 16th, 19th, 20th December 1864, large quantities of sugar, *inter alia*, 1315 bags *ex-Plaisance* estate, and on 19th January 1865, 151 bags *ex-Richemare* estate.

The *Plaisance* sugars in question formed several parcels, to wit:

Plaisance. – Bags	774		
,, ,,	98		
,, ,,	127	Vide delivery order and	
,, ,,	177	Mr. Chauvin's acceptance B. Nr. 1.	
,, ,,	139		
	1315		

The *Richemare* sugar made up one parcel only, or at least it will be sufficient to look upon it as forming one parcel only for the purposes of this case.

Those sugars were under Dock-warrant, but it is clearly shown that, on the 21st day of December, the delivery order for the *Plaisance* sugars in question was ready, and the Defendant actually received it from the Oriental Bank on the 28th December; the delivery order for the *Richemare* sugars was of the 28th January 1865. (Vide B Nr. 1 and C Nr. 1.) Unfortunately the Defendant had not taken delivery on the 12th February 1865, and on that day the sugars in question, or at least most of them, were lost or damaged through the flood which caused so much loss of life and property in this island. The parties are now struggling not *ad lucrum captendum*, but *ad damnum vitandum*, the Plaintiffs alleging that the Defendant was bound to take delivery within fifteen days after the sale; the Defendant, without contesting the obligation under which he lay, declining his liability on grounds which we shall proceed to examine.

By Art. 1585 of the CODE CIVIL, when goods are so'd by measure or weight, the loss is *prima facie* the vendor's loss, until such goods have been measured or weighed, saving always the vendor's right to damages. But the result of this law is that vendors could and always would compel the buyer to measure or weigh at once, as soon as the contract of sale would be otherwise complete; and this provision of the law, which lays down a general principle, would often be modified by special contracts, to avoid the inconvenience, to purchasers of the colonial staple produce, of taking delivery at once, when they might not be ready, from want of freight or any other cause, to ship the produce purchased, and, as the case often is, draw against such shipments.

In practice, therefore, the sugar trade has settled what should be a quasi special contract on every case, and a Code of practice, of which a printed copy is before us, has expressly laid down the modifications under which it appears that such contracts are generally construed. Those modifications do not interfere with the law, but they avoid the necessity of determining, by a special contract in every case, the time within which the buyer shall be bound to take delivery, the time therefore when his liability to pay the sale price, and his liability to bear the loss, in case of loss, shall begin.

There is no doubt that, without such a Code of practice in this respect, special contracts would be made, and like all other legal contracts be sustained; and there is no doubt also that special contracts may now be made, the Code of practice laying down merely the well understood conditions for payment and risk, when no other special conditions arise from the contract between vendor and purchaser.

This Code of practice, we have in evidence, is invariably adopted for the sale of sugar by *both* the brokers who sell and the merchants and brokers who purchase sugars. But in this case, it has been distinctly admitted by the parties that they were bound by its provisions, relative to the sale of sugars, and that Art. 32, in all its tenor, was to be construed as embodying the contract between parties.

Now Art. 32 runs thus: "Sugar, the produce "of the colony, shall be excepted from the con- "ditions established in Arts. 1, 2 and 30. The "delivery, in this case, shall be made within the "fifteen days following that of the sale, and any "claim for difference in quality, comparing with "the selling sample, shall be made before the "sugar is taken away or shipped. Any differ- "ence in the quality shall be determined amica-

" bly by the parties to the contract, or by arbi-
" tration; no claim for difference shall be admissi-
" ble, if the difference established shall be less
" than 25 cents per 100 pounds; and if the dif-
" ference established shall amount to 25 cents
" per 100 pounds, or if the description of sugar
" delivered be different from the selling sample,
" it shall be optional, with the buyer to cancel
" the sale or to complete the delivery at the price
" fixed by the arbitrators.

" After the expiration of the delay of fifteen
" days, the sugar shall be at the risk of the buy-
" er, unless within that delay he shall have claim-
" ed delivery, and the delay shall thus be proved
" to have been caused by the seller.

After the expiration of the delay of fifteen
" days, no claim for difference shall be admissible
" if the difference established shall be less than
" 15 cents per 100 pounds; and if the difference
" established shall amount to 50 cents per 100
" pounds, it shall be optional with the buyer to
" cancel the sale or to complete the delivery at
" the price fixed by the arbitrators.

" In establishing any difference in the price
" of sirop sugar, the arbitrators shall take into
" considerations the deterioration which may
" have taken place in the selling sample."

By this provision it is plain that the vendor is bound to give the purchaser fifteen days grace before he can claim his money or free himself from the dangers more or less remote which attend such perishable goods stored in public warehouses; but when the delay of fifteen days has elapsed the buyer must pay, upon an approximative account, and certainly from that moment, the loss, if loss there be, is his loss.

The buyer is, in our opinion, rather benefited than otherwise; for without this implied, in this case we may almost say express contract, there would be nothing in law to prevent the vendor, as soon as the sale has been agreed upon, to compel the purchaser to weigh his goods, and whatever might be the conditions as to the time of payment, certainly to suffer all contingent losses, as in fact he actually, from the moment he has purchased, profits by or suffers from a rise or fall of the sugar market. The convention here postpones the weighing and the consequent contingency of loss for fifteen days, at the buyer's option, for it is proved that he may weigh and claim delivery at once, if so inclined. The delay is in his favour, and accordingly should not be extended except by consent.

In this case, it was admitted, on argument, that for by far the largest parcel of the sugars sold the weighing and delivery did not take place within the fifteen days; there cannot therefore be a reasonable doubt that the Defendant is *a priori* bound to suffer the loss; indeed for the *Plaisance* sugars *i. e.* all the sugars which form the subject matter of this suit, save 151 bags, the Defendant might have got the delivery order on the 22nd December, took it on the 28th, and the flood damaged the sugars on 12th February 1865, upwards of one month after not only the expiration of the delay within which the risk remained the vendor's risk, but after the delivery order had been actually handed over to the Defendant.

An attempt was made to distinguish the 151 bags *Richemarre* sold in January, from the other sugars, and it was urged that the delay ran, not from the day of the sale, but from the date of the delivery order.

If it had been shown that the Plaintiffs, from whom the Defendant received a letter to get his delivery order, had for some cause imputable to himself, or for which he should answer, delayed the delivery order, there might be something indirectly in the defence; but there is absolutely nothing of the kind, just the reverse; and if there is nothing of the kind, it woul be perfectly unreasonable to compel the vendor to wait, it may be, fifteen additional days for his money, and to submit to the risk of loss in the mean while. But such are not the conditions of the Code of Practice which distinctly speaks of the day of sale, not of the date of the delivery order. The day of the sale is the *terminus à quo*; the date of the delivery order mostly depends upon the exercise of the will of the purchaser, who can apply for it whenever it is most convenient for him to do so.

The identity of the sugars was stated not to be sufficient; we have examined the Dock Warrant, Mr. Arbuthnot's letter to the Oriental Bank, the Defendant's promise to pay; comparing those documents with the parol evidence, we have not a shadow of a doubt that the sugars sold to Chauvin, and mentioned in letter B. No. 1. were those which were at the Albion Dock under Dock Warrant, and which were subsequently damaged by the flood. In his several letters to Arbuthnot touching his liability, Chauvin never thought of this objection, in fact all his witnesses speak of the sugars and do not suggest a doubt of their identity.

The Defendant further urged that those sugars were stored in warehouses which were not duly licensed, and that the Defendant was deceived; the warehouseman, it was argued, is the agent of the vendor who must support the consequences of the agent's deceit.

The Defendant, in his personal answers, does not say that he was deceived; the warehouses were licensed; they were hired by the Albion Dock, licensed, the sugars were stored in them whilst they were licensed, suffered by the Defendant to remain in them, whilst licensed, there is no proof that, if those stores were unduly licensed, the Albion Dock Company were privy to the illegality complained of; there is assuredly no proof that the Plaintiffs knew of such illegality any more than the Defendant. The fact of their being licensed was publicly known to both Plaintiffs and Defendant, the fact of the license having been unduly obtained unknown to the Plaintiffs as to the Defendant.

But let us suppose that the stores had been unduly licensed, the warehouseman may be the vendor's agent before the sale and fifteen days after the sale, but after that delay the sugars

are the purchaser's sugars, and stored at the purchaser's risk, it is such purchaser's duty as well as right, if he finds the stores unsecure, or unduly licensed, to ship or otherwise take away his produce; but if he chooses to allow such produce to remain where it lay before, now that the risk is his, now that he is bound to know that the stores were unduly licensed, if the vendor was bound to know that fact before, now that he has the same opportunities of knowing that fact that the vendor had before, he cannot complain; if the vendor was wrong before, the purchaser is wrong now, he should take delivery and delivery he might have taken.

This is so true that the store dues are not paid by the vendor alone; they are paid one half by the vendor, one half by the purchaser, a practice which is consistent with the fact that, at one period the warehouseman holds the sugar in store for the vendor, at an other period for the purchaser.

Here we have no doubt that the purchaser's knowledge was exactly that of the vendor; he knew, when he bought and stored at the Albion Dock, that the Albion Dock stores were all licensed; he showed his confidence in that Dock in leaving his sugars from 21st December, when he might have got the delivery order, (vide C. I) up to the 12th February, when the flood took place, and we see nothing to induce us to believe that the vendors knew or could know better than the purchaser that the stores were unduly licensed.

We have gone upon the hypothesis that the stores were unduly licensed; in reality we have but presumptions before us, presumptions which the owners of the warehouses might easily dispel, for ought we know, were they before the Court. But as between the vendor and purchaser of those sugars, as a matter of fact, the stores were licensed and publicly appeared to be so from the beginning to the end of this transaction.

It may be also that the Albion Dock are to blame, if they are answerable to those who have suffered from their negligence, but *res perit domino*, and by law and by his contract Chauvin was the *dominus* of the sugars on the 12th February 1865, he has his action against the Dock, but that is no defence to the action of the Ceylon Company.

We are of opinion that, for the 151 bags sugar *ex Richemarre*, and the lot of 774 bags sugar *ex Plaisance*, the Plaintiffs have made out their case, and no satisfactory answer has been given.

But there are four smaller lots, touching which a special defence,—which in no way touches the two lots already disposed of, since delivery of those was never applied for,—has been on other grounds set up.

They are the lots. 98 bags
127 ,,
177 ,,
139 ,,

The two last form the one lot of 316 bags not lost in the inundation; the two lots, 98 and 127 bags have been lost.

The Defendant argues that he is not bound to pay for those sugars, because, when applied for delivery, they were tendered to him and rejected by him.

The Plaintiffs say that the sugars could not be rejected at all; that they were only rejected in March 1865, when two of the lots had been lost; the Defendant, on the other hand, insists that they were rejected in December, and supposing they could not be rejected, the rejection took place and was acquiesced in.

We have already quoted, at full length, Art. 32 of the Code of Practice; it refers, not only to payment and risk, but to those cases when sugars may be rejected altogether or when a deduction from the price agreed upon may be insisted on by the purchaser. In order that the sugars may, at the option of the buyer, be rejected altogether, the difference between the quality tendered and the sample must amount to 25 cents per 100 pounds; if the difference be below that, the parties settle the difference in price amicably or by arbitration.

But after the delay of 15 days the difference must amount to 50 cents to give the buyer the option of rejecting or receiving at the price fixed by the arbitrators.

In this case, according to the contract between parties, the sugars could not be rejected, for the sworn brokers' report and their evidence show that the difference, between the quality tendered and the sample, was not sufficiently great to entitle the buyer to reject. The Defendant however argues that, whether entitled or not to reject, he did reject, and the rejection was acquiesced in.

Now, it seems to us very clear that, out of the four smaller lots, to which this defence applies, two only can be affected by it. Two of the smaller lots were not and could not be rejected, for they were never brought out of the Dock. The sugars were sold in lots or parcels, one might be liable to rejection, the other not liable; it had not been stipulated that if one parcel was rejected, the others should be so likewise; on the contrary, it is shown that the Defendant took delivery of some sugars; the several parcels sold were of different quality, the Defendant, in his letters, whilst repudiating his liability as to the larger lot, destroyed by the flood, says he is ready to pay for what the Plaintiffs shall deliver; he says so too late, and when delivery has been by himself postponed too long; but this shows that the rejection of one parcel did not carry the rejection of all.

Now we do not see how, either the Defendant, or Mr. Ryder for him, could have rejected lots 98 bags and 127 bags, which the evidence, as to this, unrefuted of Charron and Harrel, shows not to have been brought out of the Dock at all and not to have been compared with the sale samples.

The defence, therefore, can only touch the two

other smaller lots, together 316 bags *Plaisance*. The evidence as to them is contradictory. Ryder and Beguinot say they were rejected; Charon and Harel say they were sent back to the Albion Dock stores because the Defendant thought they would better suit another ship than the one they were loading. We are inclined to think that they were rejected; Arbuthnot writes as much; when he got the information, is not clear; but he writes they were rejected and does so in February. That is not the real issue as to those 316 bags sugars; it matters little whether they were rejected, if as we think they ought not to have been rejected unless the Plaintiffs acquiesced in the rejection. And the question is therefore this: have we got sufficient evidence, or any, that the rejection was acquiesced in. Mr. Hart certainly only heard of it on the 5th or 6th February, and as he would naturally then inform the Ceylon Company, it is easily understood why the Manager of the Company should, in February, write of the sugars as having been rejected, adding at the same time that no delivery had taken place. But in Mr. Arbuthnot's letter there is not a word from which a consent already or then given is to be implied; quite the contrary.

That the rejection was acquiesced in can therefore be gathered only from the fact that Mr. Ryder told the sworn weigher he rejected, adding that the sworn weigher acquiesced. The sworn weigher, we are inclined to think, may represent the vendor who happens to have no clerk present at the weighing for the purpose of receiving notice of rejection or of a claim for a diminution of price, we are inclined to think also that he is bound to forward such notice to the vendor; but assuredly it is no part of his business to acquiesce to a rejection of sugars, when the vendor, on receiving notice, may have the best reasons in the world to withhold his assent from the pretentions set up by the purchaser. His power does not extend so far. Now, apart from the statement made by Mr. Ryder to the sworn weigher, the evidence is repugnant to the idea that the Ceylon Company assented to the rejection of those small lots of sugar.

Our view of this matter is corroborated by Mr. Chauvin's letter of the 16th February 1865, acknowledging receipt of three letters, amongst them that of Mr. Arbuthnot of 6th February 1865. Whilst declining his liability to pay for the sugars lost in the flood, the Defendant writes that he is ready to pay for the sugars delivered or to be delivered. There is no mention of any sugars having been rejected and we find an allusion made to that fact only in the letter of 7th March 1865.

Viewing the whole facts of the case, we are of opinion that the two lots 177 and 139 bags ought not to have been rejected, and that, although there is evidence sufficient to lead us to believe that Mr. Ryder would not take them, there is not evidence sufficient to show that the Ceylon Company are estopped from standing on their legal rights, on account of their having acquiesced in the rejection. The fact that those two small lots were sent back to store was properly brought forward, but that fact, according to Durocher's evidence, is by no means incompatible with the fact that the rejection of the sugars was not acquiesced in, nay, it is directly compatible with the evidence of Charon and Harel.

For the very best reason, no doubt, but still for reasons of which he must bear the consequences, the Defendant delayed, although often pressed, to take delivery of the sugars he had bought; a fatal calamity visited the Colony, and the owner of those sugars has unfortunately suffered from it; the owner of those sugars at the time was the Defendant; by the terms of his contract, a well known contract, one of a daily occurrence, the loss was to be his loss, whatever might be the cause of the loss, if he did not take delivery within fifteen days after the sale, unless there was laches on the part of the Plaintiffs; he did not take delivery within fifteen days after the sale, though he had the order, and he shows no laches on the part of the Plaintiffs. If the sugar market rose it rose to his advantage, he would suffer from its fall, at his choice; if he thought the stores unsafe, he might ship or convey his goods to some other warehouse; by his choice he suffered them to remain where they were. If there has been negligence, or anything worse on the part of the Albion Dock Company, his action in damages is not taken away from him. But a contract must carry with it its own fair, common sense consequences; we would not extend the Defendant's liability, we find nothing to justify us in curtailing it; and after giving this case our best consideration, we have, not only upon the law of parties which was sufficiently clear, but upon the facts, come to the conclusion that the Plaintiffs are entitled to the Judgment of this Court, with interest and costs.

SUPREME COURT.

APPEL D'UN JUGEMENT DU MASTER.—ORDRE.—IMMEUBLES POSSÉDÉS EN INDIVIS.

PÉREMPTION D'UN JUGEMENT PAR DÉFAUT.—PREUVE DE SON EXÉCUTION.—PROCÈS-VERBAL DE CARENCE.—PREUVE PAR TÉMOIN.

MANDAT EXPÉDIÉ D'ANGLETERRE ET DONNANT POUVOIR DE CONSENTIR UNE INSCRIPTION HYPOTHÉCAIRE A MAURICE.—CONTRAT PASSÉ EN PAYS ÉTRANGER.—CONTRAT PASSÉ EN ANGLETERRE.—(DEED UNDER SEAL.)—"LOCUS REGIT ACTUM."—APPLICATION A MAURICE D'UNE LOI DE L'ÉTRANGER.—COMMENT SE PROUVENT LES DISPOSITIONS DE CETTE LOI.

DROIT DE VENDEUR.—CESSION DE CE DROIT A DIFFÉRENTES PARTIES.—CODE CIVIL, ARTS. 1985, 1988, 2128, 2154, 2148, 1859, 1692, CODE DE PROCÉDURE CIVILE, ARTS. 156, 159.

Circonstances d'après lesquelles la Cour, après avoir entendu des témoins, a décidé qu'un jugement par défaut, non exécuté dans les six mois de sa date, est réputé nul et non avenu.

Un mandat autorisant le mandataire à consentir une inscription hypothécaire à Maurice ne doit pas être, à peine de nullité, rédigé en forme d'acte authentique.

Un acte revêtu des formalités exigées dans le pays où il a été rédigé est, généralement parlant, valable dans les autres pays.

De prime abord une Cour de Justice, dans toute cause soumise à sa décision, appliquera la loi du pays où l'obligation a pris naissance.

Lorsque l'on invoque la loi d'un pays étranger devant une Cour de Justice il faut prouver deux choses: Premièrement que la cause doit être jugée suivant la loi du pays étranger et non suivant la loi locale; secondement que la loi du pays étranger est telle qu'on la représente.

Les dispositions d'une loi passée en pays étranger doivent être établies, comme des points de fait, par le témoignage de personnes compétentes.

Les contrats passés en Angleterre peuvent servir de base à une constitution d'hypothèque à Maurice, l'Angleterre n'étant pas un pays étranger dans le sens de l'Art. 2128 *du Code Civil.*

Lorsque des droits immobiliers et leurs accessoires, se rattachant à des immeubles situés à l'Ile Maurice, sont en litige, en vertu de contrats passés en pays étrangers, le litige sera fixé d'après la loi locale.

Un droit de vendeur ayant été transféré en garantie à un créancier, qui prit inscription en vertu de l'acte de transport, puis à un second créancier qui ne prit point inscription, et le premier créancier ayant été remboursé de sa créance, la Cour a décidé que l'inscription prise par le premier créancier peut être invoquée par le second et lui conférer un privilège sur les autres créanciers personnels du débiteur commun.

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APPEAL FROM A JUDGMENT OF THE MASTER.—DISTRIBUTION OF SALE PRICE BY WAY OF AN "ORDRE."—ESTATE HELD IN UNDIVIDED SHARES.—COLLOCATION AND RANKING OF CREDITORS.

PEREMPTION AND EXECUTION OF JUDGMENT BY DEFAULT.—"PROCES-VERBAL DE CARENCE,"—PROOF BY WITNESSES.

FORM OF MANDATE TO AUTHORIZE THE GRANTING OF A MORTGAGE.

FOREIGN WRITING.—ENGLISH DEED UNDER SEAL.—LOCUS REGIT ACTUM.—APPLICATION OF A FOREIGN LAW.—HOW IT OUGHT TO BE PROVED.—VENDOR'S RIGHTS.—ASSIGNMENT TO DIFFERENT PARTIES.—CODE CIVIL ARTS. 1985, 1988, 2128, 2154, 2148, 1859, 1692: CODE OF CIVIL PROCEDURE, ARTS. 156, 159.

Where there was no sufficient evidence to shew that a judgment by default had been executed within six months of its date, it was held to have fallen by peremption.

A mandate from a proprietor to grant a mortgage or "hypothèque" need not be in the form of an authentic deed.

A writing executed according to the forms observed in the country where it is made, speaking generally, is valid and effectual in other countries.

Primâ facie *a Court of Justice, in every case coming before it, will apply the law of the country where it has its* vitus.

When therefore the law of another country is invoked, two things must be clearly established to the satisfaction of the Court, firstly that the case is one to be determined by the rules of the foreign not the domestic law, and secondly that the foreign law is truly what it is represented to be.

Foreign law is to be regularly proved in a Court of Justice, as matter of fact, by the opinions of persons learned in that law.

Contracts passed in England may be the basis of mortgages in Mauritius, England not being a foreign country in the sense of Article 2128 *of the Code.*

Where the rights of immoveable property, in Mauritius, or its accessories, such as hypothèques or mortgages, are at issue, under contracts made in another country, the questions will be determined by the local law.

Where an assignment of vendor's rights was made to A, in security of a debt, and he took an inscription thereupon, and afterwards to B, also in security of a debt, who took no inscription, the debt of A having been paid off from another quarter, the inscription of A was held to accrue to the benefit of B and to give him a preference over the general unsecured creditors of the common debtor.

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CANTIN & ORS.,—Plaintiffs,

Versus

BOUCHET & ORS.,—Defendants.

—

Before:

His Honor the CHIEF JUDGE *and*
The Honorable MR. JUSTICE BESTEL.

—

HON. H. KŒNIG,—of Counsel for Cantin & ors., David Barclay Chapman, and Overend Gurney & Co.

JULES L. COLIN,—of Counsel for G. M. Moncamp & Lemière, Gregson & Co. and T. A. L. Cantin.

S. J. DOUGLAS,—of Counsel for Receiver of Registration dues, the Mauritius Colonial Government, Withers, Mc Pherson, P. L. Mollière, and Ch. Mollière the wife, Antoine & ors., and Widow Dauguet.

HON. V. NAZ,—of Counsel for Dr. Luciani, Heirs Cantin, Official Assignee of Bankruptcy Hervey and Mollière.

HON. L. ARNAUD,—of Counsel for Gledstanes & Co.

L. ROUILLARD,—of Counsel for Heirs G. M. Moncamp.

W. HEWETSON,—Attorney for Cantin & ors.

J. PIGNÉGUY,—Attorney for Gledstanes & Co. and ors.

A. J. COLIN,—Attorney for Gregson & Co.

E. LECLÉZIO,—Attorney for David Barclay, Chapman, and Overend Gurney & Co.

V. DELAINÉ,—Attorney for Moncamp & anor.

E. LAURENT,—Attorney for Mollière the wife.

SLADE & BANKS,—Attornies for Withers, Widow Dauguet & ors.

J. BOUCHET,—Attorney for Bouchet, the Hon. Colonial Secretary, the Oriental Bank Corporation, the Receiver of Registration dues, and Antoine & ors.

LIST of the privileged Creditors and of the Creditors having a Mortgage inscribed on the Sugar Estates "Virginia" and "Fantaisie" and claiming payment out of the sale price of the said Sugar Estates amounting to $ 256,155.44.

Dates of Inscriptions	Claims on the whole Estates.	Claims on the ⅓ of E. Chapman.	Claims on the ⅔ of the Mollière.	
	Sequestrator $27,010.82			
	Costs of Ordre, Govt. dues, Wages of laborers, Vendor's privileges, &c. ... 67,315.91			
	Heirs of Mad. J. P. Mollière & Mad. P. Mollière, legal mortgage, (about) 4,000.			
27th April 1844... ...	J. Withers 12,021.80			
27th November 1855.	... ...	... ...	The Oriental Bank Corporation...	$ 66,666.66
			(This claim which was also inscribed on the *Queen Victoria* estate has been paid out of the sale price of the said Estate.)	
11th November 1857.	... ...	D. B. Chapman & Messrs. Overend Gurney & Co. ... $310,464.50	D. B. Chapman and Messrs Overend Gurney & Co.	310,464.50
			(Not inscribed on that portion of the Estate, but claiming a share in that portion of the sale price *as creditors* of the representatives of Edward Chapman, holding the rights of Chapman & Barclay and Barclay Brothers & Co., who had sold to the Mollière and had not been paid of the price of sale.)	
10th April 1858... ...	... ...	Gregson & Co... ... 18,045.	Gregson & Co.	18.045.
			(Not inscribed on that portion of the Estate but claiming as creditors of Chapman.)	
24th April 1858... ...	... .	Gledstanes & Co. ... $26,082.45	Gledstanes & Co...	26,082.45
			Gledstanes & Co	26,250.
			(Not inscribed on that portion of the Estate but claiming *as holding the rights* of Barclay Brothers & Co. of Chapman & Barclay and of the representatives of Edward Chapman, the vendors to Mollière.)	
8th December 1858.	Heirs Cantin 29,309.89	... ...	Heirs Cantin...	29,309.89
	(They have admitted the priority, on their claim. of the creditors claiming on the ⅓ of E. Chapman.)			
10th February 1859...	... ...	Gregson & Co .. ... 19,000.	Gregson & Co. (as above)	19,000.
9th December 1859.	... ...	Gregson & Co... ... 19,900.	Gregson & Co. (as above)...	19,900.
6th September 1860.	... ...	... ...	Gledstanes & Co...	15,000.
12th September 1860.	... ...	... ...	A. C. Macpherson	10,000.
18th February 1861...	... ...	... ...	Assignees Mailhol	305.35
18th February 1861...	... ...	... ...	J. Pignéguy...	833.33
		... ...	Mad. Ch. Mollière (legal mortgage.)	Mémo.

2nd May, 1866.

This is an Appeal from a Judgment of the Master of the Supreme Court of Mauritius in the matter of the distribution by way of an "Ordre" of the sale price of the sugar estates *Virginia* and *Fantaisie*, the said judgment dated the 17th February, 1865, and reported *Suprà*. (Vol. V, Page 46.)

All parties interested in the said Judgment appealed therefrom to the Supreme Court, and the case came before the said Court in the shape of seventeen Appeals.

The following was the Judgment of the Supreme Court which notices fully the facts and pleas of parties:

Chief Justice: In this case we have to distribute among the various claimants the sale price of the Estates *Virginia* and *Fantaisie*, in the District of Grand Port, sold together at the bar on the 16th April, 1861, and adjudged to Mr. Gaston Martin Moncamp and the Honorable Hippolyte Lemière for the sum of $250,000.

The sum is not adequate to meet the debts due to all the creditors, and it is the business of the Court to collocate or marshal the various claimants in the order of their legal preferences until the fund *in medio* is exhausted.

In a case of this description, where large Estates, held in undivided shares, have, in the course of a comparatively short number of years, passed through the hands of various proprietors and of persons representing proprietors, without a final adjustment of the rights of parties, or even full payment being made of the different sale prices, it is absolutely necessary, if we hope to avoid confusion, that the exact position of the different claimants, with relation to each other and to the shares of the price on which they ask to be ranked, be clearly ascertained at the outset and steadily kept in view.

The following appear to be the material facts:

In the year 1844, and by two formal acts passed before the late Notary Lablache, dated respectively the 17th May and 5th June of that year, the Estate *Virginia* and the Estate *Fantaisie* were sold by the proprietors, Messrs. Jean Pierre and Paul Mollière, to Messrs. Hunter, Arbuthnot & Co., Merchants in Port Louis, for the sums of $300,000, and $29,561.42 respectively.

On the 15th June of the same year, Hunter, Arbuthnot & Co. sold those estates to Messrs. Chapman and Barclay, Merchants in Mauritius, and Messrs. Barclay Brothers & Co., of London, by two separate acts *sous-seings privés*, registered the 14th of the following September, and not inscribed, for the same prices, *viz*: $300,000 and $29,561.42.

On the 5th August 1853, Messrs. Chapman and Barclay and Messrs. Barclay Brothers & Co., sold the estates by one notarial deed, drawn up by Mr. Pelte, not transcribed, to Mr. Edward Chapman, one of the members of the firm of Barclay and Chapman, in his personal name, and to Mr. Charles Mollière and Madame Lisis Mollière, in the shares of ⅓ to Edward Chapman and ⅔ to the Mollières, for the price of $180,000 payable as follows:—

$85,000	—to the creditors holding privileges anterior to the sale.
40,714.28	—to settle certain accounts between the sellers and the purchasers, and the balance.
54,285.72	—at 4 terms in the month of December in the years 1853, 1854, 1855, and 1856.
$180,000	

The last sale of the properties took place at the bar, on 1st April 1861; the seizing creditor was the Oriental Bank and the price to be paid by the purchasers, Messrs. Martin Moncamp and Lemière, was $250,000. Of this price one fifth of $50,000, was deposited on the day of the adjudication.

From the total price of...	$250,000
There fell to be deducted the balance of the account due to the sequestrator of the Estate:	27,010.82
This reduced the sum to be distributed to	$222,989.18
There fell to be added the net price of 1055 bags of sugar, the balance of the produce which had been consigned to the Oriental Bank during the sequestration..	$ 6,155.44
So that the sum to be divided under this "Ordre" is	$229,144.62

From this amount there will be deducted the various sums falling to privileged creditors: the costs of the "Ordre," Government dues, vendors' rights, wages of laborers on the estates and accounts for medical attendance. Those sums have been admitted on all hands and produce an aggregate of ... ... $ 67,315.91

Deducting this amount from the sum to be divided	229,144.52
There remains	$161,828.61
Of which ⅓ is the share of Edward Chapman	$ 53,942.87
And ⅔ the share of the Mollières...	107,885.74
Together ...	$161,828.61

The claimants who have taken part in the discussion before us are:

I.—On the 3/3 or whole divisible fund:

(1.) *The Heirs of Madame Jean Pierre Mollière and Madame Paul Mollière*, for the legal hypothec or matrimonial rights of those ladies as at the dates of their respective marriages.

(2.) *Joseph Withers*, whose inscription bears the date of 27th April 1844, prior to the sale

first above mentioned to Hunter, Arbuthnot & Co. His claim amounts to $12,021.80. He is met, as we shall see by and by, with the pleas that the judgment in his favor; the foundation of his demand, being one by default, has fallen by peremption, and secondly that his mortgage is prescribed.

(3.) *The Heirs Cantin.*—Their claim amounts to $29,309.89, with inscription dated 8th December 1858.

II.—On the ⅓ belonging to Edward Chapman, the claimants are the following:

(1.) *Mr. David Barclay Chapman* and *Messrs. Overend Gurney & Co.*, of London, for the sum of £62,092 18s. with an inscription dated 11th November, 1857.

(2.) *Messrs. Gregson & Co.*, of London, for the sum of £3,609, with an inscription dated 10th April, 1858.

(3.) *Messrs. Gledstanes & Co.*, of London, for the sum of £5,216, with an inscription dated 24th April, 1858.

(4.) *Messrs. Gregson & Co.* for another sum of £3,800, with an inscription dated 11th February 1859.

(5.) The *same parties* for another sum of £3,980, with an inscription dated 9th December 1859.

The Heirs Cantin admit that the above claimants must precede them in the ranking on this third portion of the fund to be distributed.

III.—On the ⅔ of the Mollières we have the following claimants:

(1.) *The Oriental Bank*, for the sum of $66,666.66c., with an inscription dated 27th November, 1855.

(2.) *Gledstanes & Co.* of London, who contend that, the Bank being now paid from another quarter, the sum which would have gone to the Bank ought to be paid to them, in extinction of their debts above mentioned, holding as they do the rights of Barclay Brothers & Co., of Chapman and Barclay, and of the representatives of Edward Chapman.

(3.) *David Barclay Chapman* and *Overend Gurney & Co.* of London, maintain that they have a right to draw from this portion of the fund any balance which may remain due to them, now that the Bank is out of the field, as being creditors of the representatives of Edward Chapman, to whom the shares of the Mollières belonged, as they never paid their sale price.

(4.) *Messrs. Gregson & Co,* of London, contend that this sum, the Bank being no longer a creditor, should be divided among themselves, Gledstanes & Co., David Barclay Chapman and Overend Gurney & Co., in proportion to the amount of their respective debts.

(5.) *The Heirs Cantin* contend that they are entitled to claim payment of their debt generally, out of the whole fund, and especially out of this portion of it, according to the rank of their inscription, as being creditors and holders of the rights of all the proprietors, *viz*: of the Mollières, of the representatives of Edward Chapman, of Edward Chapman & Co. and Michel Laffan, all bound to them, the heirs Cantin, as they allege, *in solido.*

It is necessary to notice here that the Mollières alleged, in the course of trial, for the first time, that the sale price due by them has been extinguished by payments made to Edward Chapman, or those in his rights, and they also argued that the sums mentioned in the assignment to Gledstanes & Co. is uncertain and indefinite, consisting partly of the balance of the unpaid price and partly of the balance of an account current. They therefore contended that the first thing to be done is to have a statement and adjustment of accounts. This point will be examined in the sequel.

In addition to the above claimants we have the following parties, holders of later inscriptions:

(1.) *Messrs. Gladstanes & Co.* claim for another debt of $15,000, with an inscription dated 6th Sept. 1860;

(2.) *Mr. A. C. Macpherson* claims for a debt of $10,000 with interest and costs. His inscription bears the date of 12th September, 1860;

(3.) *The Assignees of Maillol's Estate* claim for a debt of $305.35, interest and costs, with inscription dated 18th February, 1861;

(4.) *Mr. Pignéguy*, attorney, claims for a debt of $833 33, interest and costs, with inscription of the same date;

(5.) *Madame Charles Mollière*, claims her right of legal mortgage as at the date of her contract of marriage. This claim is not admitted by any of the creditors, and the heirs Cantin specially claim a preference over her.

We have already seen that the Estates "*Virginia*" and "*Fantaisie*" were bought by Chapman and Barclay, of Mauritius, and Barclay Brothers, of London, from Hunter, Arbuthnot & Company, and subsequently sold by the purchasers to the Mollières and Edward Chapman personally in the proportion of ⅔ to the Mollières and ⅓ to Chapman. It is admitted, on all hands, that Edward Chapman had united in his person all the rights of Chapman and Barclay, and Barclay Brothers; consequently, on the sale in 1853, the ⅓ of the Estate vested in him, at once, absolutely, by confusion, and the price of the other ⅔ payable by the Mollières, also belonged him absolutely.

All this is shewn by a deed passed before Mr. Notary GUIMBEAU, on the 26th September 1855, and another deed passed with the Oriental Bank, before the same Notary, on the 16th November of the same year.

Such being the situation of the parties who have appeared before us, we shall now proceed to deal with their claims in their order; and first, of the claims on the whole fund, or the 3/3 of the sale price, beginning with that of:

(1.) *The Heirs of the Widow J. P. Mollière.* This claim is founded on the marriage contract of that lady, and being admitted on all hands, was ordered to be paid, at the hearing of the case.

(2.) *Mrs. Paul Mollière.*—This claim is also founded on the marriage contract of the claimant, and not being disputed was ordered to be paid at the trial.

(3.) *Joseph Withers*, formerly a Merchant in Port Louis. This party claims for the amount of $12,021 80 c. His claim arises in this way: On the 18th April 1844, he obtained judgment before the late Court of First Instance, against Jean Pierre Mollière, and Paul Mollière, condemning them to pay the principal sum of $4,176 94 c., with interest and costs. Upon this judgment an Inscription was taken, in favor of Withers, on the 27th of the same month of April. The Mollières did not appear in the suit, so the judgment was taken by default.

This Inscription, being the earliest in point of date, would necessarily lead to the establishment of a priority in favor of Withers, in the distribution, of the fund if the validity of the title were admitted. But this is not the case: On the contrary, the title of Withers is attacked on various grounds. In the first place, it is said that the judgment on which he relies, being one by default and not executed within six months of its date has, by the law of the Codes, entirely fallen, and become of no effect whatever. In the next place it is contended that the Inscription, not having been renewed within 10 years of its date, has ceased to be effectual in terms of Article 2154 of the Civil Code; and it was further argued that, in point of fact, there is a "*chose jugée*" here, the Court, as is alleged, having decided the question in the case of *Cantin* v. *Quéland & Ors.* in which judgment was given on 24th February, 1865. (PISTON'S *Reports*, Vol. III, p. 28.)

Let us now examine the first ground of objection urged against this claim of Withers:

By Article 156 of the Code of Civil Procedure, a judgment by default, which is not executed within 6 months from its date, becomes absolutely null and void It is in the same position as if it had never been pronounced.

The Article runs thus: "Tous jugements par "défaut contre une partie qui n'a pas constitué "d'avoué, seront signifiés par un huissier com- "mis, soit par le Tribunal, soit par le Juge du "domicile du défaillant, que le Tribunal aura "désigné; ils seront exécutés dans les six mois "de leur obtention, sinon seront réputés non "avenus."

But what is execution of a Judgment by default in the sense of this article? The Code, with a wise foresight, has put this on a positive and distinct footing. In Art. 159 it is said: "Le "Jugement est réputé exécuté lorsque les meu- "bles saisis ont été vendus, ou que le condamné "a été emprisonné ou recommandé, ou que la "saisie d'un ou de plusieurs de ses immeubles "lui a été notifiée, ou que les frais ont été payés, "ou enfin lorsqu'il y a quelque acte duquel il "résulte nécessairement que l'exécution du Juge- "ment a été connue de la partie défaillante." The Claimant Withers, to get quit of this objection that his Judgment was never executed and is therefore void, alleged the following facts by way of establishing that it was really executed in terms of laws. He says that his Attorney, Mr. F. de Chazal, employed an Usher to put the Judgment in force, that the Usher returned a "*Procès Verbal de carence*," made a return of *nullâ bonâ*. That the return itself has been lost, but the Attorney produces his bill of costs, containing, *inter alia*, an entry of the expenses paid to the Usher for his "*Procès Verbal de carence*." But what proof have we in support of those statements? Unfortunately in the bill of costs there are no dates, and the only other document produced is a note, dated 31st August 1853, from Mr. F. de Chazal to Mr. Aikin, who then held Withers' power of Attorney during his absence from the Colony. This note has not much bearing on the present enquiry.

So much for any written evidence in the matter now under consideration. But we have further the depositions of two witnesses; Mr. F. de Chazal was himself examined and deposed that he has made a diligent search among his papers for the return *nullâ bonâ*, but unsuccessfully; that he had sent the papers, with some exceptions, to the Honorable Mr. H. Kœnig, who was the Attorney charged with drawing up the "*Ordre*;" that the return of the Usher must have been among those papers so sent; that he cannot say when he sent the papers to Mr. Kœnig, but they were never returned. He also swears that the writ was executed within 6 months after the date of the Judgment and for the express purpose of preventing the peremption of the Judgment. He cannot say if the return of *nullâ bonâ* was registered, but there is an entry in the bill of costs £1.0.9¾, which would exactly pay the Usher's costs and the charge for registration.

Mr. Kœnig was also adduced as a witness. He deposed that he was certain he had not got the papers in the case. It is very material to observe that no entry of the usher's return was found in the public Registers.

What then is the position of the case of Withers as to the execution, within six months of its date, of the judgment obtained by him on 10th April 1844? Of the special steps of procedure recited in Art. 159 of the Code of Procedure as amounting to execution, not one has been shewn to have been taken. No moveable articles have been seized and sold, the debtors, the Mollières, have not been imprisoned for the debt, no seizure of any of their immoveable properties has been notified to them, nor has any payment of costs been made by them. All that has been attempted to be proved is that a "*Procès-Verbal*

of Carence" was made by an usher, and it is contended that such a return would be an act, under the later portion of Art. 159, from which it would necessarily result that the execution of the judgment was known to the Mollières. But this is a conclusion at which it would be very difficult to arrive. Supposing we are quite satisfied that the fact were established in evidence that the usher had made a return of *nullâ bona*, could we, from thence, infer that the debtor must necessarily have known that the judgment had been executed? Plainly not, for it is quite supposable that he might have had no personal knowledge of the proceedings of the usher. It may be that, in a few of the many cases decided in France on this subject, some countenances may be found for the doctrine that a "*Procès-Verbal de Carence*" is simply of itself, and without the knowledge of the debtor being proved, an execution of a judgment, in the sense of Art. 159. But we cannot approve of this opinion and the great weight of authority is the other way. See the cases collected in SIREY'S, *Codes annotés*, by GILBERT, under the Article.

But, in the present case, we do not find it necessary to examine this point more closely, for on the question whether Withers has established by sufficient evidence that there really was a return of *nullâ bonâ*, within six months of the date of the Judgment of 1844, the opinion which we have formed is adverse to the claimant.

We shall now explain the grounds of that opinion.

The proper evidence of such a step of procedure ought, of course, to be the original Return of the Usher; but no such document is forthcoming. Its absence is attempted to be accounted for by the statement of Mr. de Chazal, the Attorney for Withers, that he sent it with other documents in the case to Mr. Kœnig in support of Withers' right to share in the division of the sale price of the estate, then about to be the subject of an "*Ordre.*" But Mr. Kœnig has deposed that he is certain he did not get the documents. At this distance of time the recollection of neither witnesses may be altogether accurate. From the letter of Mr. de Chazal to Aikin, dated in 1853, it may be gathered that the papers were sent to Mr. Kœnig before that date, and Mr. de Chazal states that some of the papers in the case were retained by him and were not sent to Mr. Kœnig. He no doubt adds that the return of the Usher must have been among the papers sent, but this necessity he does not make apparent.

Then, in the account of the costs incurred by Mr. de Chazal, for Withers, a payment of £1.0.9¼ figures as made to the Usher for the costs of the *Procès-Verbal*; but the odd pence which Mr. de Chazal states would be the charge of the registration of the *Procès Verbal* could not have been so expended, as the document does not appear, in the Registers; and further it must be remembered that there is not a date in the account from beginning to end. Mr. de Chazal has stated that the proceedings were taken within the six months for the express purpose of preventing the peremption of the Judgment, but looking at the position of the witness, the lapse of time and the general circumstances of this inquiry, already alluded to, we do not think that the statement can be held to establish the fact which it is wished to prove.

The claim of Withers must therefore be struck out of the ranking.

As this is the opinion of the Court, it is unnecessary to notice particularly the other objections started to Withers' claim. We may merely remark that in the case of *Quéland* v. *Cantin*, in 1863, the Court did not pronounce any final judgment on the validity of the objection to the Inscription of Quéland or of Withers: *viz*, that the Inscriptions had not been renewed within ten years of its date. This will be seen on looking at the subsequent report of the case, same Vol. of PISTON'S *Reports*, p. 84.

(4.) *The Heirs Cantin.* This claim arises out of a transaction between those claimants, Laffan and the other representatives of Edward Chapman and of Edward Chapman & Co., Messrs. Jean Pierre Mollière, Paul Mollière, Charles Adrien Mollière, and Mr. and Mrs. Paul Lisis Mollière. The deed of transaction is subscribed by all the parties, of the date of 16th February 1858, and registered (first original) on 22nd May 1862. By this transaction certain of the heirs Cantin gave up claims which they had upon Messrs. J. P. Mollière and P. Mollière and it was agreed that the sum of $67,500 should be paid to them by the Messrs. Mollière, with their joint and several guarantees, and with the guarantee of the heirs and representatives of Edward Chapman and of the representatives of Edward Chapman & Co. A mortgage was agreed to be given upon the whole Estate "*Virginia*" and its dependences, taking rank after the original vendor's rights, and the debt of the Oriental Bank, the latter amounting to about $55,000; and on the ½ of that estate belonging to the deceased Edward Chapman, taking rank after the inscription of Messrs. Overend Gurney & Co. Laffan consenting to give a preference over whatever might be due to him by the other proprietors of the Estate "*Virginia.*" All farther suits and claims on every side were abandoned for ever.

This agreement was deposited with Mr. GUIMBEAU, Notary, on the 27th November 1858, and, on the same day, an "affectation hypothécaire" was granted to the heirs Cantin, with priority in their favor. This last authentic act was registered on 7th December and inscribed in the Mortgage Office on 8th December 1858.

The present claimants, the heirs Cantin, concede in terms of their title, that they must be postponed, in the collocation, to the claimants of original vendor's right, and to the Oriental Bank for the amount of $55,000, and so far as relates to Edward Chapman's ½, that they must come after Messrs. Overend Gurney & Co.

In this situation of matters, the position of the claimants will be more appropriately fixed, at a subsequent stage of the ranking.

II.—We have now to consider the next class

of claims, *viz:* those immediately affecting the ½ share of Edward Chapman, and

(1o.) The claim of *Mr. David Barclay Chapman* and *Messrs. Overend Gurney & Co.*

The interest of those parties is very large, *viz:* £62,092 18s 2d sterling, and their claim has been very fully and anxiously discussed.

Their inscription is dated 11th November 1857, and is founded on a deed executed at London, on 18th May 1855, and deposited with a Notary in Mauritius on the 7th Nov. 1857.

It is contended, by the opponents of this claim, that the deed of 18th May 1855 is ineffectual, indeed that it is absolutely null and void.

From the nature of the pleas of parties, it is indispensable that the shape, the object, and the clause of this writing should be very closely examined.

The instrument, as we have just stated, was executed at London on the 8th May, 1855. It is in the form which, we believe, is called, in England, a deed under seal. The parties are:

(1o.) The heirs of the late Edward Chapman, *viz:* his widow and children;

(2o.) Atholl Burnett, of Port Louis, surviving partner of the company of Edward Chapman & Co., for the said firm and for himself individually.

(3o.) Robert Michel Laffan, a Captain in the Royal Engineers, who appears to have lent his assistance to the family of the late Edward Chapman, in the arrangement of their affairs, and to whom they had assigned, in the way and form after mentioned, the whole of their estates, properties and assets subject to the obligation of satisfying the existing claims thereon.

(4o.) David Barclay Chapman, of London, Banker, for and on behalf of the firm Overend Gurney & Co., and in his individual capacity.

The deed goes on to recite a "deed" of 30th June 1852, between (1o) Edward Chapman, then sole liquidator of his late firm of Chapman and Barclay, (2o) Robert Gurney Barclay, for his firm of Barclay brothers & Co., (3o) Hedworth David Barclay and Alexander Charles Barclay, (4o) William King, carrying on business under the firm of Thomas and William King, (5o) David Barclay Chapman, for and on behalf of his firm of Overend Gurney and Company; the deed of 30th June 1852 establishing that the Estates of *Queen Victoria* and *Woodford*, in the Island of Mauritius, with their whole appurtenances, were hypothecated for the payment to the firm of Thomas and William King of £12,500 and to the firm of Overend Gurney & Co. of £12,501, that day lent to Edward Chapman, with interest at the rate of 5 per cent per annum, the principal sums and interest to be paid as therein specially mentioned.

The deed of 8th May 1855 farther recited another deed of the same date as the above first recited deed, *viz.*, 30th June 1852, and between the same parties, whereby ½ of the Estate *Mont Mascall*, in Mauritius, was made a farther security to each of the firms of Thomas and William King and Overend Gurney & Co., for the repayment of the principal sums of £12,500 and interest.

The deed of 8th May 1855 then recites a deed of transfer and sale made of the same date as the other two recited deeds, *viz:* 30th June 1852, and between the same parties, in which third deed so recited it was setforth that the firms of Chapman and Barclay and Barclay Brothers & Co., had by contract, sold the "*Virginia*" and "*Fantaisie*" Estates, of which they were the owners, to Charles Adrien Mollière and Marie Eulalie Mollière and to Edward Chapman individually, in equal one-third shares in consideration of the sum of $180,000 for both Estates, to be paid by certain instalments, with interest; the four instalments therein mentioned of the purchase money and interest, due by the purchasers, were (subject to prior charges thereon for securing Hedworth David Barclay and Alexander Charles Barclay the sum of £10,000 and interest) transferred to the firm of Thomas and William King and Overend Gurney & Co. as a farther security for payment of the two sums of £12,500; and farther the one-third interest of Edward Chapman in the Estate *Virginia* formerly *Eastwick Park*, in Mauritius, with the whole appurtenances, was in the first place made a security for payment to Hedworth David Barclay and Alex. Chas. Barclay of the said sum of £10,000 and interest, and in the next place was made a farther security to each of the said firms of Thomas and William King and Overend Gurney & Co., for the said two principal sums of £12,500, and interest.

The deed of 8th May 1855 then sets out that the first instalment of the said debt had not been paid to Overend Gurney & Co., and if not paid on or before 30th June next (*i. e.* 1855) the whole of said principal sums and interest would be due and payable under the above securities.

The deed then goes on to recite that under two deeds of the 30th October 1850 and 10th August 1852, a sum of $25,000, due to the firms of Barclay Brothers & Co. and Chapman & Barclay, charged upon the "*Isle d'Ambre*" estate, in the Island of Mauritius, and another sum of $45,000, due to the said firm by Mr. Desbarrières Pougnet, of Mauritius, or so much of said debts respectively as remained due, were assigned as a security, to the said David Barclay Chapman for and on behalf of himself and the other parties of the said firm of Overend Gurney & Company, for two sums of £5,000 and interest at 5 per cent, the one advanced and lent by him on 30th October 1850, and the other on 10th August 1852, and by a deed dated 11th August 1852, the said Edward Chapman did hypothecate the estate "*Louisa*" in Mauritius, with the whole appurtenances, for the payment, to the said David Barclay Chapman of the said two sums of £5,000 with interest at the rate of 5 per cent per annum.

The said deed of 1855 recited farther:

(1o) That in order to promote a settlement between Edward Chapman & Co. and a London firm of Allen & Anderson, the said R. M. Laffan did, among other things, on the 9th December 1854, give to the said firm his promissory note for the sum of £5,000, payable 15 months after date, on condition that Overend Barclay & Co. would discount the same, which they accordingly did; farther (2o) That accounts having been made up between Edward Chapman & Company and the said Allen and Anderson, it was found that a cash balance of £7,079 11s. 8d. was due, by the former to the latter, under certain credits given by the said firm of Overend Gurney & Co. on account of the said firm of Allen and Anderson which ought to have been liquidated by Edward Chapman & Company; (3o.) That, from an account made up between the representatives of the late Edward Chapman and the said firm of Edward Chapman & Co., it was found that those parties were indebted to Overend Gurney & Co. in the sum of £13,846. 5s. 4d. over and above the said principal sum of £12,500; secondly in the above recited mortgages; also the said sum of £5,000 in respect of Laffan's promissory note and over and above the aforesaid sum of £7079. 11s. 8d. for which credit had been given by Overend Gurney & Co. to Edward Chapman & Co. on account of the said firm of Allen & Anderson making together the principal sum of £38,425. 17s. farther (4o.) That there remained due from the representatives of Edward Chapman to the said David Barclay Chapman,on behalf of himself and his said firm of Overend, Gurney & Co., in respect of the above-mentioned securities of 30th October, 1850, and 10 & 11 August 1852, the principal sum of £8,000, which, being added to the aforesaid amount of £38,425.17, makes in all a sum of £46,425.17, due from the representatives of the said Edward Chapman and the said firm of Edward Chapman & Co. to the said firm of Overend Gurney & Co. farther (5o.) That Overend Gurney & Co. have purchased or are about to purchase the claims which the aforesaid firm of Ths. & Wm. King, of London, have in respect of the sum of £12,500 secured by mortgage on the *Queen Victoria* and *Woodford* estates and other properties and assets, which claims amount at this date to £ 13,200. (6o.) And whereas there will therefore be due to Overend Gurney & Co. a total of £ 59.625.17 which, with interest at 5 per cent on that part of it bearing interest, will amount on 1st January 1856 to £ 62,092.18.2. (7o.) And whereas the whole of the estates and all other assets whatever, now the property of Messrs Chapman or of George H. J. M. Chapman, or the firm of Edward Chapman & Co., and all the estates, claims or other assets which belonged to the late firm of Chapman & Barclay, or to the late Edward Chapman, have been made over to the said R. M. Laffan and George H.J. M. Chapman to be held by them as their absolute property, in equal shares subject to the obligation of liquidating the present claims. (8o.) And whereas in the deed assigning the said properties and assets to R. M. Laffan and George H. J. M. Chapman, it is stipulated that, till the present mortgages are paid off, the whole of the control and management of the properties should be vested in the said R. M. Laffan. (9o.) And whereas in order to assist the said R. M. Laffan in carrying out the liquidation, the said firm of Overend, Gurney & Co., in consideration of the said estates of *Queen Victoria*, *Woodford* and *Louisa*, and the one third of *Mont Mascall* and *Virginia* being made a security for the whole of the said principal sum of £ 62,092.18.2. with the interest from the 1st January 1856, and the said R. M. Laffan in his individual capacity guaranteeing the payment of the said money and interest at the period after mentioned, agreed to give time for payment to the said firm of Chapman & Barclay, and the heirs of the late Edward Chapman, and the said late firm of Edward Chapman & Co. of the said money and interest, and Overend Gurney & Co. also agreeing to relinquish their lien on the debts of $25,000 and $45,000, due from the said Rouillard and Desbarrières Pougnet, so far as they or David Barclay Chapman were interested therein, in virtue of the aforementioned deeds of 31st October 1850 and 10th August 1852, and to discharge the said firm of Allen & Anderson from all liability in respect of the before-named accounts.

Therefore the said deed of 8th May 1855 witnessed that, in consideration of the aftermentioned covenants, entered into by the said David Barclay Chapman, on behalf of his said firm of Overend Gurney & Co., as of himself, the other parties to the deed, the heirs of Edward Chapman, with the consent, concurrence and confirmation of the said R. M. Laffan and Atholl Burnett, did oblige and hypothecate unto the said David Barclay Chapman, for and on behalf of the said firm of Overend Gurney & Co., with and for the payment of the said sum of £62,092 18s. 2d., with interest from 1st January 1856, (1o) the estates of *Queen Victoria*, with sugar establishments and appurtenances; (2o) the estate *Woodford*, with sugar establishments and appurtenances; (3o) the estate *Louisa*, with the sugar establishments and whole appurtenances therein; also the one third share and all interest of the said late Edward Chapman in the following estates: (1o) *Mont Mascall*, with the sugar establishments and whole appurtenances; the estate *Virginia*, formerly *East Wick Park*, consisting of about 893 acres of land, with the sugar establishments and whole appurtenances thereof; upon which estates the said heirs of Edward Chapman, R. M. Laffan, and Atholl Burnett, consented that there should be taken, at the office of hypothecations in Mauritius, the whole Inscription necessary and proper for the benefit of the said David Barclay Chapman, for and on behalf the said firm of Overend Gurney & Co., as mortgagees for the sum of £62,692.18 2d. so due and owing to the said firm, without prejudice to existing mortgages. It was farther stipulated that if the interest should fall into a certain arrear, or the first instalment of capital should not be paid at the date fixed or for 12 months thereafter, the whole of the said sum of £62,092.18.2, or the part thereof remaining unpaid, with interest, should immediately thereafter become due and payable and recoverable, and therefore the said firm of Overend Gurney & Company or the said David Barclay Chapman, might immediately proceed to enforce payment and dispose of the whole of the properties.

For the consideration aforesaid the said R. M. Laffan, in his individual capacity, did undertake that the said sum of £62,092 18s 2d, with interest, should be paid to David Barclay Chapman and his executors for and on behalf of the said firm of Overend Gurney & Co., and for the consideration aforesaid the said David Barclay Chapman, on behalf of his firm of Overend Gurney & Co., covenanted with the other parties to the deed that as soon as the hypothecation of the estates intended to be charged should have been legally completed, the claims of $25,000 and $45,000, due from Messrs. Rouillard and Desbarières Pougnet, should, so far as he or the said firm of Overend Gurney & Co. were interested, absolutely cease and determine, and the said firm should release the firm of Allen & Anderson from all liability in respect of the aforesaid accounts. In the last place, the several parties to the deed appointed the Honorable Mr. HENRY KŒNIG and GUSTAVE KŒNIG, Notary of Port Louis, their Attornies, with power to register, inscribe and record the deed, but also for the purpose of granting and accepting, if necessary, a more perfect and complete hypothecation of the several estates, with power to enter up satisfaction as soon as the hypothecation is completed on the aforesaid charges or liens of $25,000 and $45,000; and all the parties to the said deed bound and obliged themselves, and Atholl Burnett and David Barclay Chapman bound their respective firms to ratify and confirm all and whatsoever their said Attornies should do for the purpose of carrying out the deed.

So much for the leading clauses of this lengthy instrument.

It is shewn by a regular Notarial Act that on the 7th November 1857 the above deed was deposited with Mr. Jean Baptiste GUIMBEAU, Notary in Mauritius, by the Honorable Mr. KŒNIG, mandatory as aforesaid, with the object and for the purpose of having the character of an authentic act impressed upon it, that a formal and regular "*hypothèque*" or mortgage should be taken, in virtue of it, over the different Estates and properties set forth in the above recited deed of 8th May 1855.

This mortgage was accordingly inscribed by a "*bordereau d'inscription*" dated 11th November 1857.

The inscription bears to be taken: "au profit de Messrs. Overend Gurney & Company, "négociants de Londres, et de M. David Barclay Chapman, aussi négociant," by Mr. KŒNIG as their representative in the island. It is taken in virtue of the deed of 8th May 1855, turned into an "acte authentique," as above mentioned, against the representatives of the late Edward Chapman and the said R. M. Laffan, and for the said amount of £62.092.18.2, due to Overend Gurney & Co., and the said David Barclay Chapman, as set forth in the above deed of 1855. The estates over which the "*hypothèque*" extends are "*Queen Victoria*," "*Woodford*," "*Louisa*," the ⅓ undivided of "*Mont Mascall*" and the ⅓ undivided of the Estate "*Virginia*" nciluding the Estate "*Fantaisie*," situated in the District of Grand Port, and containing about 1,055 acres, with buildings, dependencies. &c., the whole of which estates were the property of Mr. Edward Chapman.

Such are the writings on which Mr. Western, holder of the powers of Attorney both of David Barclay Chapman and Messrs. Overend Gurney & Company, puts forward in support of his claim, in the present suit.

It is not disputed, by those who oppose the collocation of Mr. Western for his constituents, that the whole of the said sum of £62,092.18.2, was advanced to Edward Chapman and his representatives, as set forth in the deed of 8th May 1855, and that the latter are bound to repay the same. The *Bona fides* of the claim of David Barclay Chapman and Overend Gurney & Co., represented by Western, is not impeached, but it is said that their mortgage and security is bad. It is contended that, however just the demand for the whole amount may be against Chapman's representative, the sole point before the Court here is a question of the ranking of certain "*hypothèques*" or mortgages depending upon the formal validity of each security. It is maintained that the mortgage on which Mr. Western claims is bad in law and that therefore he can have no place in the present division of funds, at all events till the whole of the other mortgages are satisfied.

In proceeding to examine the legal question which here arises, we think it may fairly be admitted in the outset that the creditors who contest the claim of Mr. Western are entitled to state their case in the way they do.

It must be remembered that we are here dealing with a fund which falls to be distributed among the holders of the inscribed "*hypothèques*" or mortgages according to the dates of their inscription; if the "*hypothèques*" are themselves formal and valid. We must therefore examine the objections which are put forward against the "*hypothèque*" under which Mr. Western advances his claim.

Now what are those objections? They may be shortly stated as follows: It is said that the deed of 8th May 1855, being made in England, its validity must be determined wholely by English law; that it is bad and inept by that law, *ab initio*, and that nothing subsequently done in Mauritius can cure its defects. It is maintained that it was bad by the law of England, as to Overend Gurney & Co., because they are no parties to it and are in fact strangers to the deed. That David Barclay Chapman, though a partner of that firm, had no authority whatever to represent them in this transaction, and whatever sum may have been due originally to him personally has undergone novation and is now indistinguishable, being thrown into the mass with the advances of the firm. It is contended that the deed is not an unilateral one, by which Chapman's representatives bind themselves to do certain things, but it is a bilateral or mutual deed in which obligations were undertaken on both sides.

From this it is argued that it is absolutely necessary that all the persons interested should be parties on the face of the instrument itself. That absent parties could not be bound without their written authority, and not being bound could not, on the other hand, take anything by the deed (COLLYAR *Partnership*, Vol. 1. 308. ADDISON on *Contracts*, p. 1033. *Contrà* STORY'S *Conflict* § 287. FELIX *International Law* T. 242. ADDISON p. 39.)

It was further contended that, even if Overend Gurney & Co. had been parties to the writing, it could not, in law, authorize the taking of a "*hypothèque*" in this colony, as England being, in the eye of our law, a foreign country, the 2,128th Article of the Civil Code applies, which declares that contracts passed in foreign countries cannot be the basis of mortgages in France, and this defect was not cured by depositing the deed in the archives of a Colonial Notary. CODE OF CIVIL PROCEDURE, Art. 546. STORY on *Bills*, p. 26.

Mr. KŒNIG in making this deposit, it was argued, went beyond his mandate. He ought to have taken judgment on the deed, in a Court in Mauritius and followed judgment up by a mortgage. But further, according to the best French authorities, the power from a proprietor to mortgage his property must be given in the form of an authentic deed, a mere writing *sous-seing-privé* is not sufficient, and therefore the mortgage in question is invalid and ineffectual, as the deed of 8th May 1855 was not an authentic act. (TROPLONG, *Hyp.* No. 505. S. 1858, 1 322. GILBERT ad Artio. C. C. 2127. *Contrà* IBID. Nr. 1, 2, 3, 7. RIVIERE, *Revue Doctrinale &c.* Art. 761.)

Again it was said that Western's powers are defective, as it is not shewn that the firm of Overend Gurney & Co., at the date of his mandate or power of Attorney, was identical, as to partners and otherwise, with the firm as it stood when the deed of 1855 was executed; and it was further submitted that no subsequent ratification by the debtors could cure the original defect, at least to the prejudice of prior inscribed creditors, and lastly it was maintained that, even if the mortgage were effectual in all respects, it could, from its very terms, be entered only over the price of *Virgina* proper, exclusive of *Fantaisie* altogether.

Let us now examine those different arguments:—

It will be observed that the whole contention of the parties who oppose the collocation or ranking of Mr. Western, on behalf of Mr. David Barclay Chapman and of Messrs. Overend Gurney & Co. is directed against the deed made at London on 8th May 1855.

It is said to be informal and null and void. The subsequent act of deposit of this deed, with the Notary in Mauritius, which in ordinary circumstances gives, by our law, to a private deed, all the force and efficacy of a public Notarial instrument, is not challenged, at least in point of form, nor is anything alleged against the shape or regularity of the *Bordereau d'inscription* following therein, or of the power of Attorney given to Mr. Western vesting him with all the powers, both of David Barclay Chapman and Overend Gurney & Co.; the original instrument made in London is alone attacked. What was called in the discussion the root of the title of Mr. Western's constituents is struck at, and if it is shewn to be bad, the subsequent proceedings, it is contended, must fall to the ground, and the mortgage in question must disappear from the ranking.

Now, so far as the objections to the validity of the deed of 1855 are foundnd on the law of England, any Decision which we may pronounce must necessarily be given with very great diffidence.

We pointed out to the parties, in the course of the argument, that if they were to rely on the direct application of the law of England proper, it would be much more regular and satisfactory to ourselves that they should take the ordinary means in such cases for putting us in possession of the law of that country on the points in dispute.

We should then have been in a good position to deal with that law as matter of fact, the only way in which judges can usually apply the law of another country where it is their duty to do so in a case depending before them.

But all parties joined in an anxious request that the Court should proceed at once without any opinion of English lawyers. The Counsel stated that the case has been in dependence before the Master for several years, and that further delay was most undesirable. We did not press the matter further; but we repeat that our opinion, in matter of English law, must be taken as the opinion of judges who cannot claim to be familiar with every branch of that system.

Looking then at the questions which have been raised in this part of the argument, we are quite prepared to admit the force of the reasoning of the parties who impugn the validity of the deed of 1855; that, in ordinary circumstances, a writing, to be effectual, must be executed according to the forms and solemnities of the place where it is made.

The maxim *Locus regit actum* is one of the few rules of what is commonly called private international law which are accepted by the leading authorities of all nations. But, so far as we can see, the deed in question is regularly executed, according to English solemnities.

It appears to be a deed under seal, which, we believe, is a very formal mode of making a contract in England, and approaches the nearest to the *Acte authentique* of our law, made before a public notary. *Ex facie*, therefore, and so far as we have yet gone, we think that the writing is a valid instrument and that it is our duty to support it.

But we have next to enquire if the position maintained by the Counsel arguing against the

deed is well founded, *viz:* that David Barclay Chapman, one of the partners of Overend Gurney & Co., could not, by the law of England, act for his firm without express formal written authority, which he had not, and that his firm, being no parties to the instrument, can take no benefit under it.

It appears to us that it is established by the English authorities quoted in the course of the discussion that one partner of a firm cannot, in ordinary circumstances, bind his co-partners, without their express written authority, against their will, so as to prevent their repudiating the obligation, if they are so inclined.

It is said that this is an undoubted principle of English law, and that it gives us the rule by which we must guide ourselves in determining the present question. It does not appear to us, however, that even if we were to hold that this position had been established before us as a matter of clear English law, it will necessarily follow that it must solve the question now to be determined. In these descriptions of international law, as soon as we get beyond the mere point of the solemnities observed by the law of the place, in the form of a writing, we find ourselves in a much more debateable territory. As we have seen, the instrument must be executed according to the forms observed in the place, but when we go farther and find a difference in the law of the place where the deed is made and the law of the place where it is to be performed, as to matters connected with the contract, for example the powers of individual partners to bind their fellows without a power or written authority, the case is by no means so clear.

But it does not appear to us that it is necessary to travel into this field of enquiry, for while, as we have already stated, we think that there is authority for the position that, by the law of England, a partner cannot oblige his fellow partners without special power to do so, no authority has been pointed out for another proposition which comes, we think, much nearer to the state of matters actually existing in this case, *viz:* that a partner of a firm cannot, without special written authority from his co-partners, enter into a contract with a third party for the benefit of himself and his firm, and even undertake obligations for the firm which, if duly performed, will entitle him and the firm to sue on the contract for the counter part of the stipulations. It may be that, by the law of England, this is not allowed. But such a state of the law has not been shewn to us.

In our own and other systems, derived directly from the Civil law, a party to a contract may stipulate for the benefit of a third party, tho' that third party does not join in the deed: "On "peut pareillement stipuler au profit d'un tiers "lorsque telle est la condition d'une stipulation, "que l'on fait pour soi même, ou d'une donation "que l'on fait à un autre."

"Celui qui à fait cette stipulation ne peut "plus la révoquer si le tiers a déclaré vouloir "en profiter." CODE CIVIL, Art. 1121. So again, in terms of the immediately preceding Article, a party may take burden upon himself for a third party: "se porter fort pour un tiers," just as Mr David Barclay Chapman does for Overend Gurney and Company at the conclusion of the instrument in question. If the third party accepts the position, as Overend Gurney & Co. have done here, it is the same as if they had been parties to the deed from the beginning. This is very clearly stated by ROGRON, in his commentary on the Article: "Ce dernier, (le "tiers) lorsqu'il refuse de ratifier, ne con-"tracte aucune obligation; mais s'il ratifie, la "personne qui se porte fort est dégagée de toute "obligation, et le tiers est lié comme s'il avait "donné mandat dans le principe." *Rati habitio mandato a qui paratur.* Moreover, by the law of the Code, in partnerships, the act of one partner will benefit the others and will indeed *e contra* be usually binding upon them. "A défaut de "stipulations spéciales, sur le mode d'adminis-"tration, l'on suit les règles suivantes: 1o. Les "associés sont censés s'être donné réciproque-"ment le pouvoir d'administration l'un pour "l'autre. Ce que chacun fait est valable, même "pour la part de ses associés, sans qu'il ait pris "leur consentement; sauf le droit qu'ont ces "derniers, ou l'un d'eux, de s'opposer à l'opéra-"tion avant qu'elle soit conclue." Art. 1859.

Thus, in the present case, David Barclay Chapman, in contracting with the representatives of Edward Chapman in England, to the large pecuniary advances in question, appears to have acted partly for his own behoof, so far as the money was his own, and partly for behoof of this firm as far as the money belonged to the firm. The execution of the deed, by the borrowers, in which all this is set forth and admitted, would be sufficient in favor of the firm, so far as they are interested, and would operate as to them a *jus quæsitum tertio*, according to the common form of expression, even if the relation of partnership with the actual party to the deed did not exist.

Now this appears to us to be a very equitable principle; at all events it was conceded that this is the law of the CODE CIVIL which, *primâ facie* at least, we are bound to apply to the cases coming before us, till we are satisfied that a different rule ought to prevail in any particular case.

In the present suit it has not been made clear to us that any other law than that of the CIVIL CODE is to be applied in the circumstances accrueing here. Indeed, looking at the nature of the questions raised, touching as they do the real property of the Colony, and one of its most important incidents viz: mortgages or "*hypothèques*," it is not easy to see how any other than the local law should regulate the matter. For while, as we have already seen, the maxim that *locus regit actum* is a rule of international law, in other words the validity of a deed as to its form will be governed by the rules of the law of the place where it is made, the effect of the writing will, usually, be determined by the law of the place where the contract is to be performed, and in particular where questions regarding immoveable property are concerned, the *lex loci rei sitæ* will give in the rule of determination.

" Lorsque, selon la nature du contrat, ou se-
" lon la loi du lieu de sa passation, ou selon sa
" disposition expresse, il doit recevoir son exé-
" cution dans un lieu autre que celui de sa ré-
" daction, dans tous ces cas, il s'interprète d'a-
" près la loi du lieu de l'exécution." FELIX, *Droit Internationnal Privé*, LIV. II. Sommaire p. 82 : " La matière des actes licites de l'homme, en " leurs solennités internes, sont régies par le " statut réel, en tout ce qui concerne les im-" meubles."—*Ibid.*

At the same time we are prepared to admit that if the parties resisting the validity of the mortgage in question had shown us that, by the law of England, one partner of a firm could not, without express written authority from the other partners, have done what David Barclay Chapman did here for the benefit of himself and of his firm, looking at all the circumstances, it would have been our duty to consider more particularly whether the law of England or of Mauritius was to govern the matter, for it might have been argued, with some force, that the character, or as we would say the quality (*la qualité*) of Mr. Barclay Chapman *i.e.* his competency to do as he did, must be determined by the law of the place where the contract was made. But as we have already stated, nothing of this kind has been shewn to us. We must therefore decline to refuse effect to the deed of 1855 on the ground now under consideration.

The next objection to the validity of the mortgage in question is founded on Article 2128 of the Code which runs in these terms : "Les contrats " passés en pays étranger ne peuvent donner " d'hypothéque sur les biens de France, s'il n'y " a des dispositions contraires à ce principe dans " les lois politiques ou dans les traités." It is argued that, although politically England has ceased to be a foreign country with regard to Mauritius, still in matters of private right it must be deemed to be a foreign country, like Scotland for example, as the laws of the two countries are entirely dissimilar.

On considering the law of the Civil Code in question it appears to us that the object of the rule was to protect the soil of France from being affected by contracts made in countries actually foreign, that is to say forming no part of the Kingdom of France.

We should much doubt if it would have been held at any time, in France, that contracts made in a part of the French territory, the civil laws of which were not at the time altogether identical with those of France proper, would fall within the exclusion.

We do not think that this Article of the Code applies to the present case, where though there is a difference between the laws of the countries, England and Mauritius are portions of the same empire. There is no object, either political or industrial, in protecting the soil of Mauritius from being given in pledge for advances of English capital, but the reverse, and to say that arrangements for this beneficial purpose cannot be made in England, but only in Mauritius, would lead to very great embarrassments. We do not think that the law, either in its words or spirit, is applicable to the existing relations of England and Mauritius, and this objection against the validity of the mortgage must therefore be repelled.

As to the objection that Western's power of Attorney is defective as it is not to be assumed that the Overend Gurney & Co. at its date was the Overend Gurney & Co., of 1855, we think that the objection as stated must fail. We asked the Counsel making the objection if he was in a position to allege that there had been a change of partners in that firm. He admitted that he was not in a situation to make any positive averment farther than to refer to the fact that Mr. David Barclay Chapman had ceased to be a partner.

In this state of matters we cannot presume that there has been any change in the firm between the dates of 8th May 1855, when the instrument was executed, and that of the 17th Nov. 1858 when Mr. Western received his power of attorney.

As to Mr. David Barclay Chapman being now out of the firm, that matter is unimportant as Western expressly holds his powers, and Mr. Chapman is accordingly fully represented in the suit as well as the firm of Overend Gurney & Co.

Let us now notice the objection that the authority to grant a "*hypothèque*," or mortgage, must be in the form of a notarial deed or "*acte authentique*" like the mortgage itself.

It is true that there are authorities in France, of high standing, who maintain that the power from a proprietor to grant a mortgage over his estate can be given only in the form of a notarial deed or "*acte authentique*," and that no writing "*sous seing privé*" will be sufficient for this purpose. (See among the latest RIVIÈRE *Revue Doctrinale de la jurisprudence de la* COUR DE CASSATION p. 703 Art. 76.)

But there are authorities of at least equal weight on the other side.

It appears to us that the latter opinion is the better one, or at all events by far the more consistent with the text of the law, which must be the primary guide of a Court of Justice.

What is that text ? It is contained in Article 1984 and following of the Code :

" Le mandat, ou procuration, est un acte par
" lequel une personne donne à une autre, le
" pouvoir de faire quelque chose pour le man-
" dant et en son nom."

Art. 1985.—" Le mandat peut être donné ou
" par acte public ou par écrit sous seing-privé,
" même par lettre. Il peut être aussi donné
" verbalement, mais la preuve testimoniale n'est
" reçue que conformément au titre des contrats
" ou des obligations conventionnelles en général."

Art. 1988.—" Le mandat conçu en termes gé-
" néraux n'embrasse que les actes d'administra-
" tion."

" S'il s'agit d'aliéner ou hypothéquer, ou de " quelque autre acte de propriété le mandat doit " être exprés."

We thus perceive that the mandate may be given in either of the three written forms of notarial act, private writing or letter, and in cases of small value even verbally, and still more when the law speaks of the kind of mandate with which we are here dealing, *viz*: A mandate to authorize a mortgage or "*hypothèque*," all that is said of it is that it must be express. Nothing is said of the necessity of having it in the form of a notarial act. And therefore, notwithstanding the ingenious commentaries on this article, in some of the French authors and in the course of the argument before us, we cannot take upon us to add the word *authentique* to the text. We are the more confirmed in the opinion we have expressed by the fact that we find when the legislature wished to have mandates in that particular and solemn form, it has distinctly said so. Example of this will be found in Art. 36 and 66 of the Code:

Art. 36.—" Dans le cas ou les parties intéressées ne seront point obligées de comparaitre " en personne, elles pourront se faire repré- " senter par un fondé de procuration spéciale et " authentique."

Art. 66.—" Les actes d'opposition au mariage " seront signés, sur l'original et sur la copie, par " les opposans ou par leurs fondés de procura- " tion spéciale et authentique; ils seront signi- " fiés, avec la copie de la procuration, à la per- " sonne ou au domicile des parties, et à l'Officier " de l'Etat Civil, qui mettra son visa sur l'ori- " ginal."

It is also worthy of remark that if a regular "*acte authentique*" were absolutely necessary to give authority to mortgage property in Mauritius, there is scarcely any part of the British dominions where such an act could be procured, as the notarial system of France is not in use with us. We may remark, in conclusion of this part of our Judgment, that there is another answer to the present difficulty, raised by the opponents of the demand of Mr. Western, by no means void of cogency probably, if it were necessary to perform it. It will be recollected that, according to the opinion already expressed by us, the instrument executed in London on 8th May, 1855, though not an "*acte authentique*," in our sense of the word, is nevertheless an operative instrument and is not null and void. It is therefore in the position of what we call a private writing, or an "*acte sous seing privé*." Now such a writing, on being regularly deposited by the parties with a Notary, as was done here by Mr. KŒNIG, acting as we think quite within his mandate, becomes equivalent to a formal "*acte authentique*."

We are therefore of opinion that this objection to the claim of Mr. Western must also be repelled.

The last point pressed upon our notice by the creditors who oppose the claim of the parties from whom Western holds his authority was that, in any view, the mortgage given in virtue of the deed of 8th May 1855 could extend only over *Virginia* proper and not over *Fantaisie*, which was sold along with *Virginia* at the bar, and it would appear is sometimes included in the general name of *Virginia*.

We are of opinion that this argument of the opposing creditors is a sound one. It will be observed that among the Estates over which the mortgage was to extend by the deed of 8th May 1855, appears "*Viginia*, formerly "*East-Wick* "*Park*" consisting of about 893 acres of land, si- " tuate in the quarter of Grand Port, with the " houses, buildings, &c., and all the appurtenan- " ces generally whatsoever." Now this description is precise and definite. The Estate *Virginia*, consisting of so many acres, is given in pledge, and nothing more. This is clearly exclusive of *Fantaisie*. Again we find the Estate *Fantaisie* mentioned in other parts of the deed as a separate subject, and it is a most reasonable presumption that if the mortgage had been to extend over that Estate, it would have been expressly named as one of the Estates covered by the "*hypothèque*," for in such a case we cannot hold it to be embraced by the term *Virginia*. We also find that the power of Attorney to Mr. Western is expressed in similar terms. Nothing is said of *Fantaisie*. He is empowered to act in regard to certain estates specially mortgaged to Overend Gurney & Co. Among those Estates appears *Virginia*, formerly called *East-Wick Park*, consisting of about 893 acres of land. This is again exclusive of *Fantaisie*.

So far therefore as the fund divisible in the present suit is the produce or sale price of the latter Estate, we are of opinion that the mortgage of Mr. Western's constituent cannot extend over it. Accordingly, unless the parties can agree on the value of the two estates respectively, it will be necessary that a ventilation of the subjects be made, and we shall, if necessary, grant authority for that being done.

The claim of David Barclay Chapman and Overend Gurney & Co. very much exceeds the third of the fund according to the share of Edward Chapman, so far as it relates to the Estate *Virginia*. As we think that their claim is good and ought to be sustained, it is unnecessary to go into the claims of the other parties on this part of the fund, as the preference in favor of the above named claimants more than exhausts it.

The one third part of the price of *Fantaisie* remains to be dealt with. According to the state of the productions and titles, the claimants having the preferable right here are Messrs. Gregson and Company, of London, for their debt of £3,609, to whom accordingly we award this part of the fund *in medio*, being of opinion that they have satisfactorily answered the different objections raised against them, and have established their right in law to this particular portion of the fund.

We have now to consider the claims on the price of the two third parts of the estates, according to the Mollières.

Those parties as we have already seen did not pay their sale price.

The two thirds of that price therefore remained due to Edward Chapman, as in right of the vendors, and we have to enquire how it falls to be distributed among his creditors. Is it a portion of his general assets, unaffected by any preference established in favor of particular claimants, and therefore divisible among his creditors generally, in proportion to their debts, or do any of the competitors stand in a more favorable position than the others, in relation to this fund, and are accordingly entitled to get access to it in preference to other creditors?

It is necessary that we should enquire what preferences, if any, have been established over this portion of the fund.

But here there is a preliminary matter which will be conveniently disposed of in this place. We have already said that the Mollières have latterly seen cause to allege that the portion of the price falling to be paid by them (½) under the sale of 1853, is not now due, at least they moved in the course of the argument, that the Court, before proceeding farther, should order an account to be taken between them and Edward Chapman and his representatives.

In support of this motion an affidavit was put in, during the discussion, before us, by Paul Lisis Mollière, the husband of one of the purchasers, under that sale, in which he says that he verily believes that if a statement of accounts were made up, it would be found that the purchasers, the Mollières, had paid off the sale price due by them, and that when Laffan transferred to Gledstanes & Co. the debts then supposed to be due by the Mollières as purchasers aforesaid, there was in fact nothing due by Mollières, but on the contrary they were creditors of Laffan and the representatives of Edward Chapman.

It does not appear to us that this request of the Mollières can now be listened to. It is made for the first time in the middle of the final discussion in this case, in which the proceedings have been going on since 1861. No suit has been brought during all this time to fix or render liquid any counter claims which the Mollières may allege they have to compensate the liquid obligation in the deed of sale of 1853, and the affidavit contains nothing but the vaguest of allegations.

Again if the Mollières were not the debtors in the sale price why did they allow themselves to be ejected from the estates by the "*expropriation forcée*" of the Oriental Bank? Besides, it is material to observe that the terms of various authentic instruments, to which they are parties and which are produced in this case, are inconsistent with the statement now made that they are not debtors to Edward Chapman and his representatives. We may cite, for instance, the notarial deed of date 16th November 1855, containing a "Cession" to the Oriental Bank by the firm Edward Chapman & Co. and the representatives of the deceased, Edward Chapman, of a claim of $ 66,666.66, due by the Mollières, and containing this clause:

"Déclarent, en outre, (the Mollières) se tenir "le transport fait à l'Oriental Bank Corporation "pour bien et dûment signifié, et n'avoir entre "les mains aucun empêchement ni aucune op- "position à ce qu'il reçoive son effet." Moreover we have the instrument under private signatures, dated 1st December 1855, between the Oriental Bank, Laffan and the Mollières, and to which some other parties intervened. In this latter deed we find the following clause: "Mr. Charles "Adrien Mollière et Mme. Paul Lisis Mollière, "(duly authorized by her husband) déclarent "donner main levée pure et simple de l'opposi- "tion formée par eux aux poursuites en expro- "priation forcée des biens *Virginia* et *Fantaisie*, "commencées par l'Oriental Bank Corporation, "renoncer à la demande en nullité tant des dites "poursuites, que des contrats du seize Novem- "bre mil huit cent cinquante cinq précités, in- "troduite par eux et accepter purement et sim- "plement le transport en garantie fait à la dite "Corporation par la maison E. Chapman & Co. "et les représentants de M. Edward Chapman, "suivant acte au rapport de Me Guimbeau, No- "taire, en date du seize Novembre mil huit cent "cinquante cinq, ainsi qu'il est dit ci-dessus."

In the same deed and in a subsequent clause, the Oriental Bank, on the request of Laffan and the Mollières, consented to grant to those parties certain delays for the payment of the debt to which the Bank had right under the act of 16th November 1855.

In the face of these deeds; and in presence of the circumstances already detailed, we cannot grant the motion of the Mollières that the case should stand over till an account is taken between them and the representatives of the late Edward Chapman. Let us then resume the question: What preferences, if any, have been established on the sale price of two thirds of the Estates *Virginia* and *Fantaisie* payable by the Mollières to Edward Chapman and his representatives.

It appears that on the 16th November 1855, by a regular act passed before Mr. GUIMBEAU, Notary public, the firm Edward Chapman & Co. and the representatives of Edward Chapman assigned and conveyed to the Oriental Bank two thirds of the then available and disponible part of the sale price payable by the Mollières under the sale to Edward Chapman and these parties in 1853. By the said deed of 16th November 1855 the amount of the two thirds of the said price then disposable was fixed at $66,666.66 and this amount was assigned to the Bank "pour "garantir, jusqu'à due concurrence, à la susdite "Corporation, le paiement, de la somme de $177, "159.34, qui lui est due par MM. Chapman & "Co. et les représentants de M. Chapman, pour "raison de billets à ordre, &c." The Mollières, as we have already seen in a previous part of this judgment, are parties to the deed and declare: "Se tenir le transport fait à l'Oriental "Bank Corporation pour bien et dûment signi- "fié, et n'avoir entre les mains aucun empêche- "ment ni aucune opposition à ce qu'il reçoive

" son effet." By an authentic instrument of the same date, Edward Chapman & Co., and the representatives of Edward Chapman granted a mortgage following on the said assignment, over their Estates in Mauritius, in favor of the Bank. An inscription was taken by the Bank, of the date of 27th November 1855.

We have already seen that on 16th February 1858 a transaction was entered into with the heirs Cantin, by Laffan and the other representatives of Edward Chapman and the Molliéres, on which certain deed followed, as above recited, resulting in an inscription being taken, of date the 8th December 1858, on both Estates, in favor of those heirs, with a certain priority. We have now to notice another security granted in favor of Messrs. Gledstanes & Co., of London, over the portion of the fund with which we are now dealing. On the 28th October 1858, Michael Laffan, as holder of the rights of the heirs of Edward Chapman and of the representatives of Edward Chapman & Co., assigned to Messrs. Gledstanes & Co., in the following terms, the debt which had already been assigned to the Bank.

The deed sets forth that Messrs. Gledstanes & Co. are creditors of Mr. Laffan and of Messrs. Edward Chapman & Co. in a sum of £5,216.9.10 in virtue of a Judgment of this Court of date the 24th April 1858. That besides another sum of £5,250 was about to fall due to Messrs. Gledstanes & Co. That the debtors were not ready to pay, but that the creditors had consented to grant a delay on condition that certain payments to account should be made, and certain sugars consigned as security to the creditors, and farther the deed declared that " Messieurs Burnett " et Douglas, au nom et comme fondés de pou- " voirs de M. Laffan déclarent céder et trans- " porter à MM. Gledstanes & Cie., la somme de " soixante six mille six cent soixante six piastres, " à prendre et reçevoir avec toute préférence et " priorité sur le cédant, sur ce qui est dû à M. " Laffan comme étant aux droits des héritiers et " représentants de M. Edward Chapman par M. " Charles Adrien Mollière et Madame Marie El- " vina Mollière, épouse de M. Paul Lisis Mol- " lière, tant pour balance de compte courant que " pour solde du prix de vente des biens de *Vir-* " *ginia* et *Fantaisie* au quartier du Grand Port.

" La dite créance a déjà été transportée sui- " vant acte au rapport de M. GUIMBEAU, notaire, " en cette Ile, en date du seize Novembre mil " huit cent cinquante cinq, à la Banque Orien- " tale, en garantie d'une créance plus considéra- " ble qu'elle avait sur la maison Edward Chap- " man & Cie., et sur les héritiers et représen- " tants de M. Edward Chapman. Sur la dite " créance, qui s'élevait à cent soixante dix-sept " mille cent cinquante neuf piastres, MM. Bur- " nett et Laffan, ès-qualités, déclarent qu'ils ont " payé une somme d'environ cent mille piastres, " de sorte qu'il ne reste dû à la Banque Orien- " tale qu'une somme à peu près égale à celle " mentionnée ci-dessus.

" Le présent transport est fait aussi pour ga- " rantir à MM. Gledstanes & Cie. le paiement " de la somme de dix mille quatre cent soixante- " six livres sterling, neuf shellings, dix pence, " montant des deux termes ci-dessus mentionnés " de £5216.9.10 et de £5,250, plus des intérêts " qui sont dûs, ou qui seront dûs sur ces deux " sommes et des frais.

" Le présent transport n'aura d'effet définitif " qu'après le paiement de ce qui reste dû à la " Banque Orientale, en capital et intérêts, mais " il aura partiellement effet au fur et à mesure, " jusqu'à concurrence des sommes qui lui seront " successivement payées.

" Et le présent transport étant fait en garan- " tie de la créance de M. Gledstanes & Cie. sera " éteint ou réduit d'autant par le paiement total " ou les paiements partiels qui pourront leur être " faits directement par MM. Edward Chapman " & Cie. ou par M. Laffan.

" Faute d'exécution des clauses et conditions " ci-dessus, MM. Gledstanes & Cie. entreront " immédiatement dans l'exercice de leurs droits " pour les faire valoir comme ils l'aviseront."

By a deed under private signatures dated 1st December 1859, to which the Oriental Bank, the heirs of Edward Chapman, the representative of Edward Chapman & Co. and the Mollières were parties, on the recital that by the two notarial deeds above referred to passed by Mr. GUIMBEAU, on the 23rd December 1854 and the 16th November 1855, for security of the Oriental Bank of the debt due to them, two mortgages had been given, and an assignment had been made to the Bank for the sum of $66,666.66 of the sale price due by the Mollières of the Estates *Virginia* and *Fantaisie*, and in return the Bank had granted delay for the payment of the debt, and it had been stipulated that in case of legal proceeding being taken by other creditors of Chapman & Co. or of the succession of Edward Chapman of the failure to meet the conditions of the deed of 16th November above mentioned, the delays should not be granted and the Bank might insist in all its claims, the deed goes on the setforth that these two cases had occurred and that the Bank had accordingly seized the properties of *Virginia* and *Fantaisie* and had proceeded to sell the estates by " *expropriation forcée.*"

That these proceedings were opposed by the Mollières and divers suits had been raised against the Bank, by these parties and by the widow and son of the late Edward Chapman, and by Messrs. Gledstanes & Co., and with a view of putting an end to all these proceedings, the Mollières agreed to grant a discharge of the opposition entered to the suit for their expropriation from the estates *Virginia* and *Fantaisie* and to renounce all suits for the nullity of the deed of 16th November 1855 and to accept purely and simply the cession in guarantee made to the Bank by the house of Edward Chapman & Co. and the representatives of Edward Chapman according to the notarial deed of 16th November 1855.

Mr. Laffan, so far as might be necessary, accepted the said act of assignment and the other deed passed with the Bank in regard to the debt due to it; which was then stated to be reduced to $69,467.90 as at 18th January 1859. The

Bank, in return, granted certain delays for the payment of the principal and interest of the debt, with the condition that if the stipulated payments were not made or the other creditors took active measures, the proceedings for forcible ejectment might be resumed. The son and widow of the late Edward Chapman were intervening parties to this deed and declared their acceptance of it and its condition.

Messrs. Gledstanes were also intervening parties and renounced a suit which they had raised against the Bank in nullity of the deeds of 16th November 1855, and a suit at their instance for the suspension of the demand of the Bank for forcible ejectment.

Such was the position of these different parties down to a comparatively recent date in the present proceedings.

It now appears that the Oriental Bank has been paid from other sources.* This will let in the heirs Cantin who come next, as we have already seen, in the order of time and preference. But as their claim does not exhaust this portion of the fund, the important question arises whether the Inscription taken by the Bank will accrue after the heirs Cantin exclusively to the benefit of Gledstanes & Co. to whom the said assignment was made, but who themselves have taken no Inscription on the assignment in their favor. If it does accrue to Gledstanes & Co. exclusively, and not to the creditors generally, Gledstanes & Co. will have a preference over the other creditors as to this part of the fund, to the extent of their debt.

This appears to us to be the real and serious question between the contending parties here. Some other points were indeed discussed between them, as for example the title of Laffan to assign to Gledstanes & Co. or to any other creditor, the Heirs Cantin for example, and the alleged uncertainty in the conveyance to Gledstanes & Co. arising from the clause of assignment: " sur ce qui est dû à M. Laffan comme " étant aux droits des héritiers et représentants " de M. Edward Chapman, par M. Charles Adrien " Mollière et Mme. Marie Elvina Mollière, " épouse de M. Paul Lisis Mollière, tant pour " balance de compte courant que pour solde du " prix de vente des biens de *Virginia* et *Fantai-* " *sie.*" Now, as to the first of these points, it appears to us that Laffan was fully vested with the power of disposal of the estate of the late Edward Chapman under the deed of 7th May 1855. The deed, among other vesting clauses, declares that " the sole and exclusive control, manage- " ment and disposition of the said estates and " properties shall be vested entirely and exclusi- " vely in the said Robert Michael Laffan, his " heirs executors &c. with full and uncontroll- " ed power to make such arrangements by sale " or mortgage of the same, or any part thereof, " as to him shall from time to time seem meet, " for the purpose of paying off or discharging the " incumberances affecting the properties, sub- " ject only to the obligation of rendering annual " accounts to George Chapman, son of the late " Edward Chapman."

* See Vol. II, Page 81, and Vol. V, Page 165, of these Reports.

As to the second question, we think the objection is untenable.

When we look at the deed of 16th November 1855, expressly referred to in that of 28th October 1858, we see that the amount of the portion of the sale price transferred was fixed at $66,666.66. This amount was reported in the conveyance to Gledstanes and Co, and nothing beyond it is now asked. It will be remarked that Gledstanes & Co., do not ask payment of any sum as the balance of any account current due by the Mollières to Chapman's representatives, and we do not think that the mere mention of an account current, in the manner here done, vitiates the assignment of the balance of the unpaid price of " *Virginia* " and " *Fantaisie.*" It appears to us that it was plainly the intention of the parties to assign the balance of the unpaid price, subject of course to the previous conveyance to the Oriental Bank, whether there was any balance in the account current or not. We do not think therefore that there is any such uncertainty, as to what really was conveyed to Gledstanes & Co., as to vitiate their titles of assignment.

We must now proceed to examine the main point in dispute between the parties here, *viz.* the effect, with regard to Messrs. Gledstanes & Co., of the inscription taken by the Oriental Bank, on 27th November 1855, upon the assignment in its favor. Can that inscription, now that the Bank is paid off, benefit Messrs. Gledstanes & Co. who held a later assignment of the same debt? (S. 20-1-267; 30-1-376; 42-1-801. *Contrà.* DUVERGIER. *Vente* 422. S. 32-2-210.)

There is matter of principle invested in this question of considerable importance; we must therefore resort to the text of the Code which bear upon the question. By Art. 2148 of the Code it is enacted:

" Pour opérer l'inscription, le créancier repré- " sente, soit par lui-même, soit par un tiers, au " conservateur des hypothèques, l'original en " brevet ou une expédition authentique du juge- " ment ou de l'acte qui donne naissance au pri- " vilège ou à l'hypothèque."

" Il y joint deux bordereaux écrits sur papier " timbré, dont l'un peut être porté sur l'expédi- " tion du titre, ils contiennent:

" 1o. Les nom, prénom, domicile du créancier, " sa profession s'il en a une, et l'élection d'un " domicile pour lui dans un lieu quelconque de " l'arrondissement du bureau,

" 2o. Les nom, prénom, domicile du débiteur, " sa profession s'il en a une connue, ou une " désignation individuelle et spéciale telle que le " conservateur puisse reconnaître et distinguer " dans tous les cas l'individu grevé d'hypo- " thèque.

" 3o. La date et la nature du titre;

" 4o. Le montant du capital des créances ex- " primées dans le titre, ou évalué par l'inscri-

" vant pour les rentes et prestations, ou pour les " droits éventuels, conditionnels ou indétermi- " nés, dans les cas où cette évaluation est ordon- " née, comme aussi le montant des accessoires " de ces capitaux ; et l'époque de l'exigibilité,

" 5o. L'indication de l'espèce et de la situa- " tion des biens sur lesquels il entend conserver " son privilège ou son hypothèque.

" Cette dernière disposition n'est pas néces- " saire dans le cas des hypothèques légales ou " judiciaires ; à défaut de convention, une seule " inscription, pour ces hypothèques, frappe tous " les immeubles compris dans l'arrondissement " du bureau."

From this article, which lies at the foundation of the whole hypothecary system of the Code, we gather that the creditor in person, or represented by any third party, may inscribe the mortgage. It is plain that the leading objects of the law are to give publicity to the mortgage, and to identify completely the parties concerned and the immoveable subjects in which the security is to extend ; it is not necessary that the creditor making the inscription should take it in his own personal name, although this was pleaded by the opposing parties here. This is shewn by a reference to Art. 2108 of the Code, which preserves the right of the vendor, without a special inscription in his personal favor and in his personal name. So PERSIL tells us in his *Régime Hypothécaire*, V. 2, p. 32, on Article 2148 of the Code :—

" Mais si la créance pour laquelle on veut con- " server l'hypothèque a été transportée, au nom " de qui sera prise l'inscription ? Elle pourra " l'être, sans doute, au nom du cessionnaire, en " faisant mention de l'acte de transport ; mais " *quid*. si l'inscription ne présente encore que le " nom du cédant ? Ne pourra-t-elle pas être dé- " clarée nulle, comme n'indiquant pas le nom du " véritable créancier ? "

" La négative résulte de tous les principes du " droit. Suivant la L. 8 du Code *de Hoered Vel " Act Vendit*, celui qui a transporté une créance " en reste toujours le titulaire légal, et son ces- " sionnaire n'obtient qu'un mandat, à la vérité " *in rem suam*, une action utile pour s'en appli- " quer le résultat.

" C'est ce qui fait dire à LA GLOSE sur cette loi " que le cessionnaire peut toujours agir au nom " du cédant, en vertu de l'action directe. *Semper " utilis dabitur procuratori in rem suam, suo no- " mine directa, nomine creditoris.*

" Et qu'on ne pense pas que ce soit là un " principe que nous devions à la subtilité du " droit romain ; tous nos auteurs n'ont qu'une " opinion sur cette matière."

The authority of TROPLONG is equally explicit :

" Si le cédant a pris, avant le transport, une ins- " cription de nature à conserver son privilège, le " Cessionnaire en est investi par l'existence mê- " me de la Cession, et le bénéfice de l'inscription " lui profite, de telle sorte qu'il n'est obligé de " faire aucun acte de publicité pour mettre au " grand jour les nouveaux droits qu'il acquiert " Et, en effet, qu'importe aux tiers intéressés " que les droits du cédant soient exercés person- " nellement par lui ou par quelqu'un qui le re- " présente ? Néanmoins, il est prudent que le " Cessionnaire prenne une inscription en son " nom personnel. Car un cédant de mauvaise foi " pourrait, d'accord avec les créanciers, donner " main levée de son inscription et nuire au ces- " sionnaire ainsi qu'on l'a vu dans une espèce " jugée par la Cour de Cassation, le 5 Septembre " 1813.

" Art. 264. Mais si le privilège n'était pas " inscrit lorsque la cession a eu lieu, alors c'est " au cessionnaire à prendre inscription, et il peut " le faire comme aurait pu faire le cédant lui- " même.

" Il suffit qu'il prenne inscription en vertu du " titre du cédant. Il n'est pas nécessaire qu'il " fasse mention de la cession, quand même il " prendrait inscription en son nom personnel ain- " si que l'a jugé la Cour de Cassation, par son ar- " rêt du 25 Mars 1816.—*Privilèges et Hypothè- ques.*—Vol. I, Art. 563.

IN DALLOZ we find the following opinion :

" C'est un point aujourd'hui reconnu en juris- " prudence, que le cessionnaire d'un titre de cré- " ance inscrit profite de l'inscription prise par " son cédant, et qu'il n'est pas obligé de s'ins- " crire personellement pour rendre l'acte de ces- " sion manifeste aux yeux des tiers. Qu'importe, " en effet, à ceux-ci que les droits du cédant " soient exercés par lui personnellement ou par " un autre qui le représente.

" Le Créancier peut évidemment se faire rem- " placer par un mandataire pour recueillir le bé- " néfice de son inscription ; or tout cessionnaire " est comme un mandataire ; il est qualifié par " les lois romaines, de *procurator in rem suam* " ayant l'action utile contre le débiteur, comme " le cédant à l'action directe. (Conf : M : M : " TROLONG t. 1. No. 363 ; FLANDIN Tr. des " hyp. inédit.)

" Il résulte de là une double conséquence, la " première que le cessionnaire peut prendre ins- " cription sous le nom du cédant qui reste ainsi, " aux yeux des tiers, le propriétaire apparent " de la créance ; la seconde, qu'il peut égale- " ment prendre inscription en son nom person- " nel, même avant l'enrégistrement et la signi- " fication de l'acte de cession au débiteur, et " quoique cet acte de cession soit un acte sous " signatures privées. "

(REPERTOIRE) *Privilèges & Hypothèques*, Art. 1497-1498. The authors above quoted support their doctrine by a reference to various decided cases.

We are therefore satisfied that the hypothec taken by the Oriental Bank in its own name, was a valid and effectual one.

Again it is a fixed rule of our law that any assignment of a claim carries with it the whole accessories of the debt.

" La vente ou cession d'une créance comprend " les accessoires de la créance tels que caution, " privilège et hypothèque. " CODE CIVIL Art. 1692.

It appears to us that when a mortgage is validly taken upon a claim, that mortgage becomes, so to speak, a positive reality and an existing incident of the *créance* or claim, accompanying and going along with it till the claim itself is absolutely extinguished by payment. It is a certain advantage or benefit, accruing to the claim, by which the claim becomes so much the more valuable, and when the inscription is duly taken, perfected and published in the Books of the Conservator to all the world; we see no authority in reason or principle, or in any text of the law, for holding that the mortgage is to fall and be as it were, according to our practice, *rayée* or deleted from the Books of the Conservator. When the debt has been paid off from some other source, altho' the claim has not been liquidated but has merely passed into the hands of a *bonâ fide* onerous holder who has paid full value for it, why should the actual holder of the claim not get the benefit of any mortgage which has been taken upon the claim, and which by the law is expressly declared to be an accessory of the claim, an incident which, as part and parcel of it, accompanies it wherever it goes.

It will be observed that the fullest publicity has been given to all the world. No one can say that the thing has been done in a corner and out of the reach of any fair inquirer. But it was argued here can a thing done by one person benefit another? How can the mortgage taken by the Oriental Bank benefit Messrs. Gledstanes & Co., who never took any mortgage for themselves? But the answer, we think, is satisfactory. Let us look at the precise facts: In 1855 the Bank, in security of a large debt due to it, procured a conveyance of the sale price owing by the Mollières, and very soon thereafter had an inscription thereon duly inscribed at the mortgage office. Here then we had an assignment properly secured by mortgage.

To the original and existing claim something had been legally and regularly superadded, viz.: an accessory called in law a mortgage or " *hypothèque.*" So the matter stood when the conveyance was made in favor of Gledstanes & Co., in 1858; the meaning and effect of which was to give them the benefit of the claim when the Bank should be satisfied.

Now surely they were entitled to say they had got a conveyance of the claim or *créance* as it then stood with all its incidents and accessories, supposing the Bank had been then paid off from some other funds could it be maintained that the Inscription was to vanish and fly off? We think not, the mortgage stood effectual for securing the debt to the owner of the debt, whoever he might be. The claim, with the mortgage upon it, would then according to our view have accrued to Gledstanes & Co., and we see no reason why a different result should follow because the payment of the Bank has been of a later date.

We are therefore of opinion that the claimants *Gledstanes & Co.*, now that the Bank is out of the field, are entitled to be ranked for the sum of $53,332.35 with interests and costs, next after the *Heirs Cantin*, who would prime them in any view on this part of the fund, viz.: the ¼ of the estate accrueing to the Mollières.

We shall conclude this Judgment with a summary of the results of our Decision:

The Court consider that Joseph Withers cannot rank among the mortgaged Creditors of *Virginia* and *Fantaisie* estates.

Repels the objection to the claim of David Barclay Chapman and Overend Gurney & Co., but finds that their mortgage can extend only over the one third of the price of *Virginia* estate, formerly *East-Wick Park*, and not over *Fantaisie.*

Finds that Gregson & Co., of London, for their debt of £3,609 have established, their right in law to the one third part of the price of *Fantaisie.*

Refuses the motion of the Mollières that the case should stand over till an account is taken between them and the representatives of the late Edward Chapman.

Is of opinion that the Oriental Bank Corporation, having been paid from other sources, the inscription taken by them must accrue, after the heirs Cantin, exclusively to the benefit of Gledstanes & Co.

Dissallows the claim of Mrs. Charles Mollière and orders as follows: There remains to be divided, on the sale price of *Virginia* and *Fantaisie* Estates, and on the balance of the produce of certain sugars consigned to the Oriental Bank during the sequestration of those estates, after deducting the sum of $27,010.82c. due for balance of account to the sequestrator, and that of $67,315,91c. for various sums falling to privileged creditors, the costs of " Ordre," Government dues, vendors' rights, wages of laborers on the estates and medical attendance, a sum of $161,828,71c.

The claims of Mme. Paul Mollière and of the heirs of Mme. Jean P. Mollière, being admitted by all parties, were ordered to be paid in the course of the trial.

1o. On the share of the divisible sale price affering to *Virginia* and *Fantaisie* respectively being ascertained by ventilation, or being agreed upon, Mr. Western, as representing Mr. David Barclay Chapman and Messrs. Overend Gurney & Co. will be ranked on the one third of the price of *Virginia*, for the sum of £62,092,18s. with interest and expenses.

This claim will more than absorb the fund.

2o. Messrs. Gregson & Co. of London, will be ranked on the third of the price of *Fantaisie* for the sum of £3,609, with interest and expenses;

it may be expected that this claim will more than exhaust the fund.

3o. On the other two thirds of the sale price of the Estates *Virginia* and *Fantaisie*, will be collocated. 1o. The heirs Cantin, for the sum of $29,309,89c. with interest and costs, and 2o. Messrs. Gledstanes & Co. of London, for the sum of £10,466,9,10, with interest and costs.

These claims will exhaust the fund.

The costs of the Oriental Bank to be considered and paid as costs of "Ordre."

RÉSUMÉ.

We may resume briefly in the following terms and figures the distribution of the sale price of the sugar estates *Virginia* and *Fantasie*, as established by the above Judgment.

These Estates belonging for one third to the representatives of M. E. Chapman, and for two thirds to Messrs. Mollière, had been sold in 1861 for a price of $250,000.00
now to be shared.

But of that sum has been deducted, for the Balance of Account of Sequestration of the Estates, accrueing to the Oriental Bank, the sum of 27,010.82

Leaving a balance of $222,989.18

To this balance is to be added the sale price of 1055 bags of Sugar, being the balance of the sugars consigned to the Oriental Bank during the sequestration; say 6,155.44

Whereby the sum to be distributed among the creditors of Chapman & Mollieres amount to $229,144.62

Out of the whole amount of that sum it has been allotted to several creditors holding privileged claims on the Estates, such as privileges of Vendors, Costs of "Ordre" and of Registration, Wages of laborers, Medical cares, &c. &a .. $67,315.91
and to Mad. Paul Mollière and the heirs of Mad. Jean Pierre Mollière, for their legal mortgage arising out of marriage contracts, a sum in principal of about ... 4,000.

Total amount ... $ 71,315.91

Leaving a balance of ... $157,828.71

Whereof ⅓ for the creditors of E. Chapman, say $52,609.54
And ⅔ for the creditors of Messrs. Mollière say 105,219.17

Total amount of... $157.828.71

Out of the third accrueing to the creditors of E. Chapman, the portion of the sale price of *Virginia proper* shall be applied to the claim of Messrs. David Barclay Chapman and Overend Gurney & Co., and the portion of the price of *Fantaisie proper* shall be applied to the claims of Messrs. Gregson & Co.

So that the respective prices of *Virginia* and of *Fantaisie* will have to be determined hereafter by way of "Ventilation."

The two thirds of the sale price of *Virginia* and *Fantaisie* accrueing to the creditors of Messrs. Mollière, shall be applied first to the payment of the claim of the heirs Cantin, and the Balance to the claim of Messrs. Gledstanes & Co.

Ranking or "Tableau d'Ordre" of the privileged Creditors and of the Creditors having a Mortgage inscribed on the Sugar Estates "Virginia" and "Fantaisie," among whom is to distributed the sale price of the said Estates amounting to $ 256,155.44, conformably to the Judgment of the Supreme Court of Mauritius dated the 2nd May 1866.

Dates of Inscriptions.	To be paid out of the whole sale Price.	To be paid out of ⅓ of the sale Price.	To be paid out of ⅔ of the sale Price.
11th November 1857	Sequestrator .. .. $27,010.82 Costs of Ordre, Government dues, Wages of laborers, Vendors privileges, &c. &c. about ... ... 68,000. Heirs of Mad. J. P. Mollière and Mad P. Mollière about ... ... 4,000.	D. B. Chapman & Messrs. Overend Guerney & Co. (On *Virginia* proper.) Gregson & Co. (On one third of the sale price of *Fantaisie.*)	
10th April 1858 ...	... ...		
8th December 1858	... ...		Heirs Cantin ... $29,309.89 Gledstanes & Co. 52,332.45*

* The amount of claims collocated to the "Ordre" is given here in principal only.

SUPREME COURT.

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SURENCHÈRE DU DIXIÈME.—ASSIGNATION EN RECEPTION DE LA CAUTION.—VACANCES.—ORDRE DU JUGE.—MOTION.—ART. 832 C. P. C.

Celui qui fait une surenchère du dixième doit fournir caution et assigner les Defendeurs à trois jours, devant la Cour, pour la réception de la dite caution.

Si au jour fixé pour l'audience, (par un Ordre dre du Juge en raison des vacances) toutes les causes ont été renvoyées à huitaine, le surenchérisseur doit, à peine de nullité de sa surenchère, faire mentionner sa cause à la nouvelle audience, bien que cette cause soit déjà sur le rôle pour pour être jugée à son tour.

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OUTBIDDING OF ONE TENTH,—SUMMONS FOR ADMISSION OF THE SECURITY, — VACATIONS, — JUDGE'S ORDER,—MOTION.—ART. 832, C.P.C.

The Summons for the reception of the security which an outbidder for one tenth gives, must be made returnable before the Court within three days.

If on the day when the summons has been made returnable (by a Judge's Order on account of the vacations) all the causes have been postponed to another day, the outbidder must, although his cause is already on the Cause List to be tried in its turn, move on the last mentioned day, or the summons lapses and the outbidding is annulled.

—

BROWN.—Plaintiff,

Versus

DANTIER & ORS.,—Defendants.

—

Before:

The Honorable Mr. JUSTICE BESTEL *and*
The Honorable Mr. JUSTICE COLIN.

—

Hon. V. NAZ,—of Counsel for Plaintiff.
J. G. TESSIER,—Plaintiff's Attorney.
Hon. L. ARNAUD,—of Counsel for Defendants.
J. PIGNÉGUY,—Defendants' Attorney.

—

16*th May* 1866.

In this case, Furcy Dantier, one of the Defendants, had purchased from René Paris, another Defendant, a small portion of land with buildings and appurtenances erected thereon, and situate at Gros Ruisseau, in the District of Savane, for the sum of $400.

The Plaintiff, William Brown, a creditor having an inscribed "hypothèque" upon the land in question, being anxious to make an outbidding of one tenth over and above the original sale price, served notice of his intention on the vendor and purchaser, also on one François Lelong, the original debtor, and on the 29th September 1865, obtained a Judge's Order for leave to call the Defendants before the Supreme Court.

The Order granted was special, and allowed the Plaintiff to call the Defendants before the Court, on Tuesday, the 17th October 1865.

On 17th October 1865, the Bar moved for an adjournment of the Rules and cases until the Tuesday following; that prayer was granted and all Rules and Orders returnable on the 17th October, thus specially stood over until Tuesday October 12th. The Order in question was one of those.

On Tuesday, the 24th October, the Plaintiff, who, on serving the Judge's Order, had summoned the Defendants to appear on the 17th or as soon after as the Court might take cognizance of affairs exceeding £100, did not move on that day, nor as far as we see, until the first of March. On the 20th day of March 1866, the matter, which had been entered on the Cause-paper, was called on for trial, when the Hon. L. ARNAUD of Counsel for the Defendants objected and argued that it was too late. My client has paid his purchase price and it would be very unfair that he should run the chance of being ousted when the creditor has let slip the time within which he could make an outbidding of one tenth.

By Art. 832 of the Code of Civil Procedure, the summons for the reception of the security which an outbidder must give, must be made returnable before the Court in 3 days, under pain of nullity. Here on account of the vacation, the Plaintiff got a special Order making his summons returnable on the 17th. Why did he not move? The time has gone by, the summons lapsed.

The Hon. V. NAZ:—We put the cause on the Cause-paper, it was not reached, it is sufficient for us that the cause be on the Cause-paper; the law says: "assignation à trois jours."

JUDGMENT.

The law is very clear.—Art. 832 of the Code of Civil Procedure old tex. 2nd. parag. is thus worded:

"L'acte de réquisition de mise aux enchères contiendra, à peine de nullité de la surenchère, l'offre de la caution, avec assignation à 3 jours devant le même Tribunal, pour la reception de la dite caution, à laquelle il sera procédé sommairement."

The delay is short and peremptory "à peine de nullité;" nay, the matter is to be summarily dealt with by the Court, and very properly so; the *bona fide* purchaser is exposed in private or extra judicial sales to lose his bargain when a creditor having an inscribed hypothec choses le-

gally to make an outbidding of one tenth on the first sale price, but the *bonâ fide* purchaser ought to know his fate, and ought to know it promptly. Nothing is so contrary to our views as to yield to nullities which may sometimes really check the exercise of a legal right, and we are in most cases happy to find authority to mitigate the severity of the law. In this case the authorities go no further than this, (Cass 20.1.382) that the outbidder may summon for a day posterior to the three clear days required by Art. 832, provided the summons be for the first day that the Court will sit, and in reality the Plaintiff here has had the advantage of this rule. The Plaintiff applied for a "surenchère" on the 29th September; the term ended on the 30th September The Judge in Chambers gave him leave to summon in obedience to Art. 832, for the 17th October, the first day of Term for the sittings of the Supreme Court in Banc. The Plaintiff had a further delay of one week on account of the peculiar circumstance mentioned above. On the 25th he made no sign, nor the day after, and yet Article 832 not only says that the summons shall be returnable 3 days after, but that the Court shall deal summarily with the matter.

We are told that the cause was put on the cause paper. In ordinary cases that is quite correct, but the motion for a "surenchère" of one tenth and the acceptance of the security to be given is not an ordinary case; the text of the Article sufficiently points that out, and the Plaintiff knew that so well that, in his summons, upon the strength of the Judge's Order he calls on the Defendant to appear and answer him on the 17th October or as soon as the Court shall take cognizance of civil cases.

Of course, if the Plaintiff can show that the cause could not be reached, that he gave the original purchaser an apportunity of trying the matter on the day of the return of the summons or as soon after as practicable, and that the Court having to deal with other business ordered this application to take its turn, this case would be in quite a different position. It is not possible for the Court to take every case on the same day, it is rarely possible to take every motion, or every similar summary application on the first day of Term, and "*ex necessitate rei*," some must stand over till the next motion day, or at least Court day; but in this case the matter was not mentioned: the Court took motions and summary applications on the 25th October and constantly after, and heard nothing of this application which by law, should have been summarily dealt with. The Judge's Order of the 29th September 1865 fixed specially the 17th October 1865 as the day for which the Plaintiff might summon the Defendants for the purpose set forth in the Prœcipe is that an Order be given calling upon the Defendants to shew cause, on the day to be appointed by the Judge at Chambers and the purpose set forth in the prœcipe "why an out bidding intended to be made according to the provisions of Art 832 should not be declared valid on that day;" as already stated, the out bidder did not move.

* Both technically, and what is a great deal more important, in principle, the requirements of the law have not been obeyed.

We are happy to find that, in this case, there is no allegation of any manœuvre tending to defeat the legitimate rights of those who might have wished to purchase the plot of ground in question; there has been no allegation to the effect that the sale price was below the real value of the property; and the Plaintiff has but himself to blame if he has not taken advantage of an Order which, sufficiently broad, as it stood under the circumstances was necessarily special, and could not easily be enlarged except by consent, or another Order.

The application must be dismissed with costs.

BAIL COURT.

APPEL D'UN JUGEMENT DE MAGISTRAT STIPENDIAIRE,—EMPLOI ILLÉGAL D'UN IMMIGRANT INDIEN,—PEINE,—PROCÉDURE SUR APPEL,—NOTIFICATION AU PROCUREUR GÉNÉRAL,—ORD. NO. 15 DE 1852.

La partie faisant Appel d'un Jugement de Magistrat Stipendiaire n'ayant pas notifié son Acte d'appel aux Intimés, aux termes de l'Article 19 de l'Ordonnance 15 de 1852, et le Procureur Géneral n'étant point tenu de paraître d'office dans la cause, pour la Couronne, l'Appel a été rejeté avec dépens.

APPEAL FROM A JUDGMENT OF STIPENDIARY MAGISTRATE,—UNLAWFULLY EMPLOYING AN INDIAN IMMIGRANT,—PENALTY,—FORM OF APPEAL,—NOTICE TO THE PROCUREUR GENERAL,—ORD. NO. 15 OF 1852.

Where the Appellant had not given the private Respondents Notice of the Appeal in terms of § 19 *of the Ordinance, and the case was not one in which the Procureur General was obliged to appear for the Crown, the Appeal was dismissed* in toto *with costs.*

TEELUCK,—Appellant,

Versus

HEIRS TREBUCHET,—Respondents.

Before:

His Honor the CHIEF JUDGE.

W. D. BOLTON,—of Counsel for Appellant.
S. MACQUET,—Attorney for Appellant.
V. DELAFAYE,—of Counsel for Respondents.
G. A. RITTER,—Attorney for Respondents.

9th May, 1866.

On a complaint of the Manager of the Estate *L'Espérance*, in the district of Rivière du Rempart, on behalf of the proprietors of the Estate, setting forth that one Teeluck (now Appellant), an Indian gardener, had harbored, lodged and employed a new Immigrant duly engaged on the said Estate, the Magistrate, after hearing witnesses on both sides and Counsel for the accused party, pronounced a Judgment finding that the complaint was established by the evidence, and condemned the Defendant to pay to Her Majesty the sum of £5 as a fine, and to pay to the complainants the sum of £20 as damages.

Teeluck appealed.

V. DELAFAYE, for the Respondents, objected to the Appeal being heard for want of form. By Article 19 of the Ordinance it is enacted that any party wishing to appeal, shall, among other formalities, "lodge his Appeal in the Registry of "the Supreme Court and give to the Respon- "dent notice of the said Appeal within 3 days "from the date of the recognisance." No such notice had been given to the Respondents who merely heard of the Appeal by accident.

W. D. BOLTON; for Appellant: No such notice was necessary in this case. The chief part of the Judgment was the fine. This affected the Appellant's character, though it might be less, in a mere pecuniary point of view, than the sum awarded for damages. By §§ 20 and 21 of the Ordinance it is declared:—"Every Stipendiary "Magistrate, upon receiving a notice of Appeal "and accepting a recognisance, shall forthwith "transmit to the Registrar of the Supreme "Court, duly certified copies of the original of "the Sentence or Order appealed against, and "of the whole of the evidence given on the hear- "ing of the complaint to which it refers." Article 21.—"On such Appeal being entered in "the Registry of the said Court, and on the "aforesaid proceedings being thereto transmit- "ted, notice thereof shall be given by the Re- "gistrar to the Procureur General and without "any Summons or Order to that effect, the "cause, if the Respondent be a laborer and not "appearing by Counsel, shall, *ex-officio*, be set "down for hearing, between the *Ministère Public* "and the Appellant, at the first sitting of the "Supreme Court, which may take place not la- "ter than three days after the Registrar's re- "ceiving the aforesaid proceeding, and such Ap- "peal shall have a continued priority of audi- "ence before all other causes, until finally de- "cided."

THE COURT.

This is not a case in which the Procureur General is obliged to appear *ex-officio*, for the Respondent is not a laborer and is not a party not appearing by Counsel. Accordingly the Public Prosecutor is not here. The Articles of the Ordinance relied upon by the Appellant have no application to the present case. But even if they did apply, the serious objection would remain, that, in point of fact, no notice of the Appeal has been given to the Respondents, the proprietors of the Estate *L'Espérance*, in terms of the positive order of the law. This is a most important provision. Without it the Respondents are not bound to know anything of the Appeal or to appear at all. They have not got his legal notice. It is impossible that the Court can dispense with such an omission.

The Appeal must stand dismissed with costs.

SUPREME COURT.

EXÉCUTION DU JUGEMENT D'UN MAGISTRAT STIPENDIAIRE,—MAÎTRE ET SERVITEURS,—RÉSOLUTION DE VENTE,—INTERPRÉTATION D'UNE CLAUSE DU CONTRAT,—PRIVILÈGE DES TRAVAILLEURS,—EMPLOYÉS,—ADMINISTRATEUR,—COMPTABLE,—TRAVAILLEURS EMPLOYÉS DE BONNE FOI SUR UNE PROPRIÉTÉ,—PREUVES,—FRAIS.

L'engagement pris par l'acquéreur de payer les salaires des travailleurs employés sur une propriété sucrière, ne comprend pas, sous ce terme, les administrateur, comptable et les personnes dont le service est d'un rang supérieur, mais s'applique seulement aux travailleurs dont l'engagement peut être passé devant le Magistrat Stipendiaire.

En cas de résolution de la vente d'une propriété sucrière, le vendeur ayant pris l'engagement de payer aux travailleurs le montant des gages arriérés, ne peut refuser d'en payer une portion, sous prétexte que ces travailleurs auraient été employés par l'acquéreur à faire certains travaux hors de la propriété pour laquelle ils ont été engagés.

EXECUTION OF THE JUDGMENT OF A STIPENDIARY MAGISTRATE,—MASTER AND SERVANT,—CANCELLATION OF SALE OF AN IMMOVEABLE PROPERTY,—INTERPRETATION OF A CLAUSE CONCERNING THE CLAIM OF THE WORKMEN LABORERS,—IMMIGRANTS,—INDIAN LABORERS,—"EMPLOYÉS,"—MANAGER,—BOOK-KEEPER,—WORKMEN EMPLOYED BONA FIDE ON THE ESTATE,—EVIDENCE,—COSTS.

The agreement contracted by the purchaser of a sugar estate to take charge of the salaries due to the workmen laborers employed for and on the said estate, does not extend, under this denomination, to the Manager, Book-Keeper, and to all those persons whose service is of a superior class, but is merely limited to the workmen whose engagement may be secured before the Stipendiary Magistrate.

In case of a cancellation of the sale of a sugar estate, if the vendor, by special agreement with the evicted purchaser, binds himself to pay to the workmen laborers the amount of their wages in arrear, he shall not be permitted, in order to resist payment, subsequently, of a certain portion of the wages, to object that the said laborers had

occasionally been ordered to perform works on and for another property.

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MOHABUT AND ORS.—Plaintiffs,

Versus

DE COURSON,—Defendant,

AND

MOHABUT AND ORS.—Plaintiffs,

Versus

K[VERN,—Defendant.

—

Before:

His Honor the CHIEF JUDGE, *and*
His Honor Mr. JUSTICE BESTEL.

—

S. J. DOUGLAS,—Of Counsel for Plaintiffs.
J. BOUCHET,—Plaintiffs' Attorney.
J. L. COLIN,—Of Counsel for Trustees of de Courson.
ANT. J. COLIN,—Attorney for same.
L. ROUILLARD,—Of Counsel for de Courson.
A. PISTON,—Attorney for do.
G. GUIBERT,—Of Counsel for K[vern.
J. GUIBERT,—Attorney for do.

—

16*th May* 1866.

THE COURT.—Notwithstanding the very full pleadings which the Counsels in this cause have considered it necessary to submit in the course of the trial, it appears to us that the real questions before the Court and to which we must necessarily confine our Judgment lies within a very narrow compass.

It appears, from the evidence in the case, that Mr. Charles Eugène Victor K[vern, the proprietor of the Estate "*La Rivière La Chaux*," latterly known by the name of "*Villeneuve*," in the District of Grand Port, sold it to Mr. George de Courson, on the 4th May 1861, for the price of $175,000, payable in the way and manner stipulated in the notarial deed of sale.

The affairs of Mr. de Courson having become embarrassed and certain portions of the sale price not having been paid, as agreed upon, Mr. K[vern brought a suit for cancellation of the sale, on the 11th February 1863, to which the Trustees, acting under the deed of Arrangement between Mr. de Courson and his creditors, were made parties.

The case was taken out of Court by an Arrangement, on the 14th June 1864. It was agreed that Judgment should be signed for the Plaintiff, in terms of the Declaration in the case, under several conditions. Among those appears the following stipulation, out of which the present dispute has arisen:

"Fourthly.—He (Mr. K[vern) shall remain "liable to pay all due and just priviledged claims "of the workmen, laborers, employed on and for "the "*Villeneuve*" Estate, and the debt due to "the medical practitioner who gave his care to "the said laborers, and the bill of the chemist "who furnished "médicaments" (medecine) "for the said Estate."

It has been shown to us that on the 20th June of the same year, the Stipendiary Magistrate gave Judgment in a demand brought against Mr. de Courson, by certain laborers, workmen and others, numbering two hundred and thirty one, for arrears of wages and rations due to them for work done and performed on the *Villeneuve* Estate, from 1st November 1863 to June 1864.

The demand was admitted by Mr. De Courson and Judgment went for the sum of $9,106 96 c. *in toto.*

In the present discussion, which comes before the Court by a reference from the Judge in Chambers, of an application to enforce the Order of the Stipendiary Magistrate, it has been contended on behalf of the parties in whose favor the Stipendiary Magistrate had given Judgment, and also on behalf of Mr. de Courson and his Trustees, that this Decision must be accepted in the present case as fixing and determining the rights of parties; on the other hand it was submitted, for Mr. K[vern, *firstly*, that he never bound himself to pay the salaries of the "employés" on the Estate, but only the workmen and laborers; and *secondly*, that even as to them the list before the Stipendiary Magistrate could not be accepted as conclusive, since some of those laborers had, in point of fact, worked for the Mahebourg Dock Company, in which Mr. de Courson was the leading partner, and did not properly fall within the description of laborers employed on and for the *Villeneuve* Estate.

On the 20th May last year, the Court, after hearing Counsels, by consent and reserving all the rights of parties, referred to the Stipendiary Magistrate of Grand Port to ascertain and certify which of the laborers and "employés" named in his previous Judgment were employed on and for the *Villeneuve* estate up to the 14th June 1864, and the several amounts due to them up to that date.

After a long examination of witnesses, the Magistrate made a return in which he certified that there appeared to him to be no ground whatever for alteration of the Judgment rendered by him on 21st June 1864.

We must now proceed to Judgment.

The two questions which we have to decide are: 1st. Did Mr. K[vern, by the clause in question, bind himself to pay the wages or salaries of the persons in a *superior position* on this Estate in question, commonly called *Employés*, or was his obligation limited to the payment of the

Immigrant Indian laborers who, in terms of the local Ordinances, are engaged before the Stipendiary Magistrates, and are otherwise placed, particularly as to recovery of their wages, in a very favorable position.

It appears to us that the undertaking of Mr. K[vern cannot be extended beyond this latter class. Applying to the clause in question the ordinary rules of construction of agreements we are unable to arrive at any other result. It appears to us that the words "workmen," "laborers" employed on the said Estate cannot be extended farther, so as to embrace the Managers, Book-keepers, and other *superior* persons giving their services on the Estate, and in this Colony, usually designated by the term "Employés." We are therefore of opinion that the wages or salaries due to the persons in this latter class must be struck out of the list of wages which Mr. K[vern is bound to pay. The claim of those employés is admitted by Mr. de Courson and his Trustees to whom the persons in question must look for payment, and against whom Judgment is accordingly given for the amount due, but without costs, as the demand was all along admitted.

As to the *second* question, whether it is established that all the other persons mentioned in the Judgment of the Stipendiary Magistrate were '*bona fide*" employed on the "*Ville Neuve*" Estate, we think that the Magistrate has arrived at a sound conclusion upon the evidence. Even admitting as true, what certain of the witnesses say as to some of those laborers having done work occasionally at the Mahébourg Dock, this would not, we think, so affect their position as laborers on "*Ville Neuve*" Estate, as to exclude them from being comprehended within the condition of cancellation of the sale above quoted. For the amount due to them Judgment will accordingly issue against Mr. K[vern.

None of the parties, excepting the Indian laborers, having been found entirely in the right, and Mr. K[vern never having disputed his liability to pay their wages, we shall allow no costs.

BAIL COURT.

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APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,— PRIVILEGE DU PROPRIÉTAIRE,—SUBSTITUTION D'UN LOCATAIRE A UN AUTRE AVEC VENTE DES OBJETS GARNISSANT L'IMMEUBLE LOUÉ,—SAISIE PROVISOIRE,—ART. 2102, C. C.

Le Privilege du propriétaire s'étend sur tous les objets garnissant l'immeuble loué, excepté lorsqu'il a eu pleine connaissance, ou lorsqu'il devait savoir que ces objets n'appartenaient pas au locataire.

Le propriétaire aura droit de suite sur les biens achetés de son locataire, soit qu'ils aient été laissés sur les lieux ou déplacés sans son consentement, pourvu que dans ce dernier cas il en ait fait la revendication dans le délai voulu.

Il ne doit pas être inféré de ce qu'un propriétaire consent à une substitution de locataire qu'il ait aussi consenti à abandonner son droit de suite sur les objets qui ont garni et qui garnissent l'immeuble loué, lorsqu'il lui est encore dû des loyers.

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APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE,—LANDLORD'S PRIVILEGE,— SUBSTITUTION OF TENANT WITH SALE OF GOODS STILL IN THE PREMISES LET,—PROVISIONAL SEIZURE,—INTERPLEADER,—ART. 2102, C. C.

A landlord has a privilege over all the moveable property which are placed in the house or premises he lets, except when he was fully aware or must have been aware that the goods left in the premises were not the tenant's,

The tenant's goods purchased by a third party and left in the premises let, or removed without the landlord's consent, but revendicated in due delay, are liable to the landlord's privilege, unless the landlord has waived such privilege.

The fact of a landlord accepting of a fresh tenant in substitution of the previous one cannot be construed into an admission that he waives his privilege for rent due over the goods which had been and still are in the shop.

—

MOOTOOSAMY,—Appellant,

Versus

MOUSSA JACOB,—Respondent.

—

Before:

The Honorable MR. JUSTICE COLIN.

—

P. L. CHASTELLIER,—of Counsel for Appellant.
A. PITOT,—Appellant's Attorney.
L. ROUILLARD,—of Counsel for Respondent.
A. PERROT,—Respondent's Attorney.

—

12*th June*, 1866.

This was an Appeal from a Decision of the Senior District Magistrate of Port Louis, dated March 26th, 1866, which decided in favor of the Respondent an interpleader issue raised by him, under the following circumstances:

The Appellant, the proprietor of certain premises in Queen street, had let a shop to one Moedine Hadjee who did not pay his rent. The landlord applied to the Magistrate for leave to

seize provisionally the goods found in that shop, in as much as such goods were being removed and the landlord's privilege would be defeated if the goods were suffered to be taken away. The Magistrate granted an Order which the Appellant's landlord could not carry into execution as the shop was found locked. The Appellant then obtained leave that the Usher should, in presence of an Inspector of Police, break the shop door open and proceed to his seizure. This was done; the shop door was broken open and the provisional seizure effected by the District Court Usher in presence of the Police Officer. The landlord's claim, which was altogether for £60, does not appear to have ever been disputed. But the Respondent claiming the goods seized to be his property, raised an interpleader issue which was tried by the Magistrate and decided in favor of the claimant. Against that Decision this Appeal was entered.

P. L. CHASTELLIER, for the Plaintiff, insisted upon the landlord's privilege in terms of Article 2,102 of the Code Civil, and that a tenant could not, by selling his goods, defeat that privilege.

L. ROUILLARD, for the Respondent, argued that the landlord knew that the goods had changed hands, and that therefore he was stopped; the execution creditor having agreed to take the purchaser as his tenant, cannot now complain, and the purchaser cannot be answerable for the rent due by the vendor.

P. L. CHASTELLIER, in reply: There must be a special notification that the goods purchased are not answerable for the back rent, otherwise the landlord would never be presumed to have waived his privilege.

MARCADÉ, p. 181.—DALLOZ, Vol. 49, 2, 170. (Douai.)

JUDGMENT.

There is no doubt, in this case, that the Appellant is the landlord of the premises where the goods seized were found. *A priori* there is no doubt, under Art. 2,102 of the Civil Code, that he has a privilege over all the moveables which are placed in the house or premises he lets. If the landlord's claim is not disputed, the identity of the claim is admitted, they were the tenant's property but are stated to have been sold to Moussa Jacob, the Respondent. If a tenant's goods are purchased by a third party, no doubt that third party is not personally answerable for the rent due by the tenant, but the tenant's goods which are left in the premises, or which are revendicated within the legal delay after they have been removed without the landlord's consent, are burdened with the landlord's privilege, unless such landlord has waived such privilege. A waiver of the landlord's privilege is not easily presumed; it is not easily presumed that he would consent to suffer a third party to take up the tenant's position as to the shop and goods, and repudiate it as to the claim for rent which the goods in reality secure.

It is not therefore sufficient to prove that the landlord knew of there having been negociations carried on between his tenant and a third party, touching the sale of the goods, and good will, in order to assume that the landlord surely intended to waive his privileged right.

I am of opinion that the presumption points the other way. What reason have we to believe that when the landlord continues to see the goods which were stored in the shop he had let, remaining there, he intended to throw up his privilege? For what consideration would he do so? And in this case there would be no consideration at all for the waiver alleged to have taken place.

The fact stated by the claimant himself, that the landlord accepted him as his tenant, even if held to be sufficient proof, and it is denied, cannot be constructed into an admission that the landlord would waive his privilege for rent due over goods which had been and still were in the shop. There is nothing said as to the goods, nothing as to the rent, nothing more especially as to the removal of the goods; such futile presumption would be fraught with danger.

The Decision from the Cour de Douai, (DALLOZ 49.2.34) altho' not precisely in point, supports a theory which is contrary to the Respondent's views and lays down that the landlord's privilege extends even to such moveables as have been lent to the tenant, if the real owner has not informed the landlord of his rights. And that view is also that of TROPLONG and GRENIER, with the just and equitable exception laid down by the Court of Paris in *Lavalette* v *Morisseau*—DALLOZ 49.2.34 and the Cour de Cassation (D. 34.1.335) to the effect that when a landlord *must* have known that the goods left in the premises were not the tenant's he is estopped. But when such is not the case and when the waiver is not clear, positive, it cannot be presumed, and the landlord's right should not be placed in the position of being in constant jeopardy from the numberless attempts to shew that the goods belonged not to the tenant, but to others.

In this case the principle of law seems to me of easy application. There is no proof that the landlord waived his privilege, there is some proof, evidently sufficient according to the Magistrate's opinion, to support the view that he knew of the sale of the goods from his tenant to the present claimant; but that is no presumption of waiver; the landlord could not prevent the sale, but he could prevent and he tried to prevent the removal of the goods, thereby the probable loss of his privilege. He seized those goods, and to carry into effect the Judge's Order he was obliged to have recourse to force. the shop door had to be broken open. The law of the case is, I am satisfied, with the Appellant, and so far as the proceedings in this case can show the real merits, I am of opinion that the equity of the case is on the same side as the law. Decision reversed with costs.

Judgment to be entered for the execution creditor.

SUPREME COURT.

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DIVORCE,—SÉVICE,—DEMANDE REJETÉE,—ART. 231 C. C.

Les époux peuvent demander le divorce pour sévices graves, desquels il résulte que la vie commune leur est devenue insupportable, mais le divorce ne sera point accordé pour un cas isolé de mauvais traitement

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DIVORCE,—"SOEVITIÆ,"—ACTION DISMISSED,—ART. 231 C. C.

An action for a divorce may be grounded on "Soevitiæ" of habitual occurrence and of such a serious nature as to prove that the conjugal life is intolerable; one single instance of ill-treatment will not be generally a sufficient ground.

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BELLARD the wife,—Plaintiff.

Versus

BELLARD the husband,—Defendant.

—

Before:

His Honor the CHIEF JUDGE, *and*

The Honorable Mr. JUSTICE COLIN.

—

Honorable V. NAZ,—Of Counsel for Plaintiff,
W. HEWETSON,—Plaintiff's Attorney.
Honorable L. ARNAUD,—Of Counsel for Defendant.
V. G. DUCRAY,—Defendant's Attorney.

—

16*th May* 1866.

This was a suit for a Divorce. The Plaintiff, in this case, has applied for a Divorce "*à vinculo matrimonii*" on the ground of "*sævitiæ.*" The application was resisted by the husband, and after having heard the evidence adduced on both sides, by the HON. V. NAZ, of Counsel for the Plaintiff, and the HON. L. ARNAUD of Counsel for the Defendant, the Substitute Procureur General gave his conclusions contrary to the Plaintiff's prayer.

JUDGMENT.

The parties had only been married two months when the Petition for a divorce was filed; they are young; the husband is too young for a divorce by mutual consent; the wife is soon to become the mother of a child, and the "*sævitiæ*" complained of, although assuredly brutal, are not shown to have been of frequent occurrence; only one solitary instance is in reality fairly proved, and the evidence tends to shew that the husband, whose conduct on that occasion was deserving of the greatest blame, has sinned more from the ungovernable impulse of a hot temper, than from cold cruelty or heartlessness.

Now, in law, *sævitiæ* to be a ground of divorce must be shown to have been of habitual occurrence; not equally harsh, equally outrageous on every occasion, but of such frequent occurrence as to prove, to the satisfaction of a Court of Justice, that the conjugal life is intolerable, and that the Article of the Code Civil from which is drawn the remedy of a divorce *à vinculo*, may find a fair and reasonable application; one single instance of *sævitiæ* wil not *per se* suffice; how could it suffice in a case where a young couple have been united in the bonds of matrimony for so short a time? When the mutual disposition, the mutual temper, the mutual tastes and propensities of the parties can hardly have become reciprocally known. Forbearance, kindness on the one side, repentance, self-respect on the other, may yet do much to soften mere asperities of temper, promote a mutual understanding which may after all end in pure domestic happiness. And it is not after two months trial that every hope of such a consummation must or can be thrown away, when the husband's nature is not shown to be essentially vicious or wicked.

If this did not suffice to lead us to consider this application as prematurely and thoughtlessly brought on, we should find another reason in the condition of this Plaintiff; she is about, we are informed, to become a mother, and the child that she bears, may be and ought to be a most important cause of forgiveness and reconciliation. Its birth may serve to reunite the bonds which the husband's violent temper, the wife's hasty conclusions seem to have dissolved, but we trust, dissolved for a time only. If these parties married from motives of pure affection and mutual esteem, there is every reason, moral as legal, not to allow them lightly to set aside the sacred ties of matrimony, probably to repent afterwards when the child is born. If they married so carelessly, so thoughtlessly, that real affection and esteem could not influence and guide their decision, the wife, who is to obtain redress after two months' wedded life, must show a clear legal right; that we think she has not done by proving one single fact of "*sævitiæ.*"

We were pressed to allow the divorce, saddled with the condition that it should not be decreed until one year had elapsed. There are cases when it is right to order the "*année d'épreuve*" to go by before the divorce is allowed; but this proviso should be used, not abused; it might and would have been applied in this case if we had been satisfied that real grounds for a divorce had been proved; that issue must first be found for the Plaintiff, and then the "*année d'épreuve,*" which is practically but a mere stay of execution, for one year, may be ordered if the case appears a proper one for such an Order; but the issue we do not find for the wife, and therefore we must simply dismiss this application.

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SUPREME COURT.

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FAILLITE.—DEMANDE DE CERTIFICAT, — COMPTABILITÉ DÉFECTUEUSE.

Tant qu'un commerçant a un espoir raisonnable de rétablir l'ordre dans ses affaires, il ne peut se regarder comme obligé de suspendre; et lorsque sa conduite sera exempte de tout blâme sérieux, la Cour pourra lui accorder un Certificat.

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BANKRUPT,—MOTION FOR A CERTIFICATE,—DEFECTIVE MODE OF BOOK-KEEPING.

So long as there is a reasonable expectation on the part of a trader to be able to restore his affairs in order, he is not bound to stop trading, and whenever there is nothing in his conduct, either positively wilful or perverse, the Court may allow him a Certificate.

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BANKRUPTCY JULES LAVAL.

—

Before :

The Honorable N. G. BESTEL, *Commissioner.*

—

E. LAURENT,—Petitioner's Attorney.
L. ROUILLARD,—Of Counsel for Assignees.
P. E. DE CHAZAL,—Attorney for the same.

—

30*th April*, 1866.

After an attempt at an Arrangement under the control of the Court, Laval was made a bankrupt and immediately surrendered.

In due course of time, a motion was made on his behalf for a first class certificate.

This application was resisted by the Trade and Official Assignees, and it was contended that he had no right to the certificate prayed for, and indeed to any certificate at all.

The grounds of the Assignees' opposition were: 1o. The mode in which the accounts have been kept originally (*viz.*) : by single entry, which necessarily rendered it more difficult correctly to ascertain the financial position of the bankrupt; 2o. The unsatisfactory report of the accountant, wherein Laval is stated to have been below, though not very much below his affairs, (*viz.*) : in a sum of £5,000, at which time it is stated by the accountant he should have stopped his trade, in the interest of his creditors, instead of resorting, as he then did, to a better mode of book-keeping.

It was replied, 1o. That the apparent insolvency of the now bankrupt arose from several outstanding debts of an old date, the recovery of which, at the date of the examination of the books by the accountant, appeared to the latter as hopeless, such as, for instance, the debt of Loizeau, of $5,010.34, which it is confidently expected is now recoverable *in toto* or for the greater part. 2o. That the calico trade had been very dull for several years, owing to the high price of cotton. Sales were effected on a very limited scale, purchasers confining purchases within the narrowest limits by reason of the increase in the price of calico.

JUDGMENT.

It appears that the mode of Book-Keeping adopted by the now bankrupt in his starting in trade, until the year 1864, entailed on the accountant some trouble in ascertaining the true state of Laval's affairs.

The difficulty experienced was however soon mastered by the accountant who came to a conclusion unfavorable to the bankrupt who, in his opinion, was insolvent in 1864 when he resorted to a new and better mode of Book-Keeping, instead of ceasing all trading, in the interest of his creditors.

But, in expressing this opinion, the accountant tells us that he had come to that conclusion because there figured in the Books of the Insolvent certain debts of an old standing, the recovery of which appeared to him hopeless, on that very ground; that if it were proved to him that those apparently bad debts were susceptible of being recovered, whether in whole or in part, this proof would necessarily lead him *to* a different conclusion.

The proof called for which could not be given at the date of the accountant's report can now be supplied.

The recovery of the heavy debt of *Loizeau* of $5,010,34, is now matter of certainty, as stated at the bar and not disputed by the Trade and Official Assignees, Loizeau being now perfectly solvent.

As observed by His Honor the *Chief Judge*, in the case of *L'Estrange*, (PISTON'S *Report* 1863. P. 40.) "It is no doubt, frequently a "difficult task to determine the point, in the affairs of a struggling House, when all reasonable "expection of its being able to retrieve itself is "gone." That it would have been wiser, on the part of the Bankrupt, in the interest *of his creditors*, to have stopped trading in 1864 may be easily conceded. "But," as again observed His Honor the Chief Judge, in the case above quoted: "Some allowance must, in fairness, be made "for parties struggling with embarrassments, "and where the Court sees nothing in their conduct, as traders, either positively wilful or perverse, it will not deprive them of their certificate."

In this case, nothing in the conduct of the Bankrupt has been shewn to have been "*either* "positively wilful or perverse." I shall not therefore refuse the Bankrupt his Certificate, which, however will be and is of the second class.

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SUPREME COURT.

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MAÎTRES ET SERVITEURS. — CLAUSE SPÉCIALE DANS UN CONTRAT DE VENTE D'UNE PROPRIÉTÉ SUCRIÈRE RELATIVEMENT AU PAIEMENT DES GAGES ARRIÉRÉS DES EMPLOYÉS ET DES LABOUREURS. EXERCICE DES DROITS RÉSULTANT DE L'HYPOTHÈQUE LÉGALE DE LA FEMME D'UN COMMERCANT LORSQUE CE DERNIER A FAIT CESSION DE BIENS.—PREUVES. — CONCURRENCE ENTRE LES CRÉANCIERS D'UNE SOCIÉTÉ ET CEUX DE CHAQUE ASSOCIÉ.—(ORD. 33 DE 1853 ET 23 DE 1856.)

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Lorsque les acquéreurs d'une propriété sucrière auront payé, en vertu d'une clause de l'acte de vente, certains gages arriérés dûs aux employés et laboureurs, ils ne pourront, même lorsque ce paiement sera dûment prouvé, se mettre au lieu et place de ces employés et laboureurs, de façon à être remboursés, avant les créanciers hypothécaires inscrits sur le bien, si ces travailleurs et employés n'avaient pas déjà eux-mêmes établis, par un jugement du Magistrat Stipendiaire de leur District, leur droit au recouvrement de leurs gages; mais ces acquéreurs prendront rang avant les créanciers chirographaires du vendeur.

La femme dont le mari, quoique commerçant, a fait cession de biens, sans opposition de la part de ses créanciers, ne peut cependant exercer ses droits d'hypothèque légale sur les biens acquis par son mari pendant le mariage, ainsi qu'il est prescrit par l'Art. 139 *de l'Ord.* 33 *de* 1853, *sur les Faillites.*

Lorsque dans un Ordre pour la distribution du prix de vente d'une propriété sucrière, les créanciers d'une société, ayant pour but l'exploitation de cette propriété, et les créanciers personnels de chaque associé viendront en concurrence, la préférence sera accordée aux créanciers de la société sur les créanciers personnels.

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MASTER AND SERVANT.—SPECIAL CLAUSE IN A DEED OF SALE OF A SUGAR ESTATE, CONCERNING THE PAYMENT OF WAGES OF "EMPLOYÉS" AND LABORERS. — LEGAL MORTGAGE OF THE WIFE OF A TRADER, THE LATTER HAVING MADE A CESSIO BONORUM.—RANKING BETWEEN THE CREDITORS OF EACH PARTNER.—(ORD. 33 OF 1853 AND 23 OF 1856.)

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The purchasers of a Sugar Estate who have paid, in virtue of a clause in their deed of sale, certain wages in arrear to the "employés" and workmen of the estate, shall not be entitled, even if the payment is proved by a notarial deed, to be ranked, as holding the rights of the laborers, before the mortgage creditors inscribed on the estate, if the rights of the said laborers are not fixed by a Judgment of the Stipendiary Magistrate of the District; but they shall take priority before the unsecured creditors (chirographaires) of the vendor.

The wife of a trader who has made a Cessio Bonorum without opposition on the part of his creditors, cannot exercise her matrimonial rights on the immoveable properties purchased by her husband during their marriage, as prescribed in Art. 139 *of Ord. No.* 33 *of* 1853 *on Bankruptcies.*

If upon an "Ordre" for the distribution of the sale price of a Sugar Estate, the creditors of a partnership (having for its effect, the working of the said estate) claim concurrently with the personal creditors of each partner, the preference and priority shall be given to the creditors of the partnership.

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PIAT & ALLANDY & ORS,—Appellants,

Versus

CREDITORS OF F. TONNET & H. NINA & ORS., Respondents.

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Before:

His Honor the CHIEF JUDGE, and
The Honorable MR. Justice BESTEL.

—

16*th May* 1866.

This was an Appeal from a Judgment of the Master of the Supreme Court, dated 16th August last, in the distribution by way of an "Ordre" of the sum of $150,000, the sale price of the Estate *Belle Vue*, in the district of Flacq, sold by Ferdinand Tonnet and Alphonse Hector Nina to Messrs. Piat and Allandy, by notarial deed dated 20th November, 1861.

The Master had decided: 1st. That certain employés on the Estate had sufficiently established their claims and should be paid. 2ndly. That certain Indian laborers on the Estate should not be collocated as they had not proved their claims. 3rdly. That Tonnet not having been made legally a bankrupt, Mrs. Tonnet, in virtue of her legal mortgage and certain persons in her right, should be allowed to share in the fund, although Tonnet was a trader at the time of his marriage and *Belle Vue* was not acquired by him and Nina till more than a year after his marriage. 4thly. That the balance of the sale price of *Belle Vue*, after meeting the collocations of the privileged creditors, should accrue for $\frac{3}{4}$ to Tonnet and $\frac{1}{4}$ to Nina, to be divided proportionally among their creditors.

It is unnecessary to notice particularly the first part of the Master's Judgment, as the "employés" to whom he ordered payment of a sum of $809.80 were not parties to the proceedings, and had made no claim in the "Ordre." Any Judgment, therefore, for payment, in their favor, was not within the case.

The Judgment of the Master as to the fourth point was given up by all parties. The division

proposed, in proportion with the respective interests of Tonnet and Nina, could not take place, as by law the creditors of the admitted partnership must first be satisfied, before those of the individual associates could receive any part of their claims.

As to the second question, the payment of the Indian laborers, a very full argument was submitted by Counsel for the purpose of establishing that the only mode open to them by law for recovery of their wages is that traced under Ordinance No. 15 of 1852. It was agreed that they must go before the Stipendiary Magistrate, and have their claims ascertained by his Judgment, and then, in the case when the Estate is sold, they would be entitled to appear before one of the Judges of the Supreme Court, at Chambers, and get an Order for payment of the wages, out of the sale price.

It was further contended that the purchasers of the estate *Belle Vue*, Messrs. Piat and Allandy, had put in a claim in the "Ordre" amounting to $5,905.62, as the amount alleged to have been paid by them for salaries and wages in arrear at the date of the sale, for which they claimed, as coming in place of the parties to whom the salaries and wages were owing; and that the evidence produced by them, viz: a notarial instrument bearing that they had really and truly paid that amount, was inadmissible to prove the existence and amount of the debt alleged to be due, tho' it might prove that the purchasers had actually paid over the amount to persons who had been employed on the land, and to whom wages were due at the date of the sale.

To this argument, it was answered, on behalf of the purchasers, Messrs. Piat and Allandy, that in the present case there was no question as to how the wages of Indian laborers are to be recovered when they fall into arrear, or as to what the specific course of procedure may be in such cases, by our colonial law. That this was not the question really at issue between the parties. That, on the contrary, the real point to be decided was simply this: Whether the purchasers, having bound themselves in the deed of sale to pay the wages to the "employés" and laborers, on the Estate, up to a certain date, and having done so, were not entitled, upon the evidence adduced, to show that they had truly paid the amount, and were consequently entitled to take credit for the payment, out of the sale price.

They further submitted that, having been obliged to open an "Ordre" for the distribution of the sale price, because after the sale they found real burdens upon the Estate, which apparently exceeded the price, they were obliged to put in a claim for the sum paid by them to the "employés" and laborers. In this demand it was true that they claimed as subrogated in the room and place of those persons, but in truth their case was that of purchasers who had engaged to pay, as part of the price of the acquisition of the subjects, certain wages in arrear, and they were now entitled to show that they had done so by the ordinary rules of evidence.

On the question of Mrs. Tonnet's matrimonial rights, the Decision of the Court in the case of *Tonnet and Ors.*, v. *Jack and Ors.*, 25th November 1864, (*IV*, PISTON'S *Report p.* 134) was quoted by the parties opposing her and the persons who claimed under her, as decisive of the question that, in the circumstances occurring here, neither she nor her assignees could make good their position. It was maintained that it was not proved that Tonnet had ceased to be a trader, when he failed, that consequently his Estate could not be carried off by the wife to the prejudice of the general mass of the creditors, for Tonnet was married while a trader, in May 1855, and he did not purchase the property till 15th August 1857. In such circumstances the legal mortgage of a wife does not, by our law, extend over the immoveable property of the husband.

JUDGMENT.

We have had an elaborate argument from the bar, with the view of satisfying us that the only way by which Indian laborers in the colony, or those holding their rights, can recover arrear of wages, is by going before the Stipendiary Magistrate of the District and following the course traced out by Ordinance No. 15 of 1852, §17. Were it necessary to decide that general question, the reasoning which has been submitted to the Court would probably prevail, but in the circumstances of the present suit we do not find ourselves called upon to go into that enquiry. The materials for the decision of the case are to be sought for elsewhere.

In the deed of sale to Messrs. Piat and Allandy, of 20th November 1861, we find that they bound themselves to pay a portion of the sale price according to the following clause: "Aux "employés et travailleurs de la propriété "*Belle* "*Vue*" pour gages à eux dûs jusqu'au premier "Décembre prochain, suivant états fournis, la "somme de cinq mille neuf cent cinq piastres, "soixante deux centièmes."..... "$5,905.62."

Now, this claim was a perfectly legal one. The purchasers undertook to apply a portion of the sale price in satisfying certain arrears of wages amounting to a definite sum and ascertained, up to a fixed date. It is not even hinted from any quarter that there was no arrears of wages, or that the arrears were of less amount than was here stated or that there was any *mala fides* in this stipulation or any intention of doing what was not perfectly right and honest. It will be remarked that there was no question between the buyers and the sellers as to the amount due for the arrears of wages. That was fixed and ascertained by the above clause, in a regular notarial deed binding upon all parties, purchasers sellers and their creditors.

It is not disputed that the purchasers paid the amount. They produce a formal notarial deed which proves that they did so.

How, then, has the complication or present complication arisen? It appears to us that this is owing to the course taken by the purchasers in the subsequent proceedings. Altho' it cannot be said that they ever abandoned what, in

aw, undoubtedly was their true intention, viz: hat they had paid under the above condition in heir deed of purchase, at the "Ordre" they ook up a position as if they merely represented he "employés" and laborers to whom they had nade payment and asked to be allowed credit or the amount so disbursed by them, as coming n the place and as entitled to exercise the rights f those "employés" and laborers. Now this osition they are not able to make good, as those employés" and laborers had not established or themselves their right to recover the amount f wages said to be due to them and their right o recover that amount. We think that there as been a good deal of mispleading on the part f the purchasers; we cannot therefore allow hem their costs, but on the grounds above sta-ed, we are of opinion that they are entitled to ake credit, after the mortgage creditors are sa-isfied, for that is all they ask, and in preference o the "chirographaires" or personal creditors, or the amount of arrears of wages viz: $5.905.62 which they undertook to pay in their deed of ale, and which they have actually paid.

As regards the rights of Mrs. Tonnet and those holding under her, the discussion in the present case had necessarily many features in common with the argument in the former case of *Tonnet and ors.* v. *Jack*, decided by the Court, n 25th November 1864. But the Judgment in hat case cannot be invoked in the light of a *chose jugée*" as absolutely and at once deter-nining the rights of the present suitors, for here is plainly no identity either of parties or ubject in dispute. The conditions of a "*chose ugée*" do not therefore exist, C C. Art 1351; nd this case must be determined upon its own nerits.

At the same time the present questions arise n the distribution of another portion of the mmoveable property of the same individual, *viz.*, Mr. Ferdinand Tonnet the husband, and the ame leading points present themselves for con-ideration, *viz.*: whether Tonnet had really cea-ed to be a trader, or whether he must be dealt vith as a trader and, in the circumstances, sub-ubject to the enactments of the Bankruptcy Ordinance of 1856. Now, the facts here are not ltogether the same as in the case with *Jack and rs*; in particular, the agreement with Jack may e said to have had more of a commercial cha-acter, as Jack, himself, was a trader; but we re of opinion that, looking merely at the facts stablished before us, in evidence, in the case ow under consideration, there is no sufficient roof that Tonnet had ceased to be a trader.

In fact, the allegation that he abandoned com-nercial business altogether, some 6 or 8 months revious to the sale of *Belle Vue*, to Messrs. Piat and Allandy, rests for support almost en-irely on his own personal statement made in his rocess of "*Cessio Bonorum.*" This was pleaded n evidence, but in vain, in Jack's case. But noreover we have it established that Tonnet's al-eged withdrawal from his commercial partnership vith Forget, was never announced to the public. That he continued to sign bills endorsed by For-get. and to endorse bills made by Forget, many f which, it is admitted, were simple renewals of the bills of the commercial partnership between him and Forget. We cannot therefore, deal with the claim of Mrs. Tonnet as the claim of the wife of a non-trader. We are, further, of opinion that Mrs. Tonnet's position must be determined by the rules of the Ordinance of 1853 touching the rights of wives of Traders, and consequently that she or those in her right cannot sustain their claim against the other creditors. The grounds of this opinion are fully stated in the former case.

The findings of the Master are therefore, recalled, and the Court decides:

First. That the employés referred to cannot be collocated in the "Ordre."

Secondly. That Messrs Piat & Allandy are to be collocated for the sum of $5,905.62, after the mortgage creditors and before the personal creditors.

Thirdly. That neither Mrs. Tonnet nor the parties claiming under her, as in virtue of her rights, can be collocated.

Fourthly. That whatever surplus remain for distribution among the personal creditors, shall be applied, in the first place, to pay the creditors of the partnership.

We do not think that this is a case for costs.

COURT OF ASSIZES.

JURY.—ALIEN.—DROIT DE RÉCUSATION.—CONDAMNATION A MORT.—"NEW TRIAL."—ORDONNANCE No. 29 DE 1853, ARTS. 93 ET 94.

Lorsqu'un "Alien" aura fait partie d'un Jury et que l'Accusé ayant eu les moyens de récuser cet "Alien," ne l'aura pas fait avant qu'il soit assermenté, le Jugement rendu par jury sera définitif.

JURY.—ALIEN.—RIGHT OF CHALLENGE.—SENTENCE OF DEATH.—NEW TRIAL.—CRIM. PROC. ORD. No. 29 OF 1853, ARTS. 93 AND 94.

Is alienage a cause of nullity of a trial by Jury? No, if the Defendant has been afforded an opportunity of challenging the disqualified juror before he is sworn and has not done so.

ARMOOGON,—Appelant.

Versus

THE QUEEN,—Respondent.

Before:

The Honorable the CHIEF JUDGE and
The Honorable MR. JUSTICE BESTEL.

The Honorable THE PROCUREUR AND ADVOCATE GENERAL, for THE CROWN.
W. NEWTON,—of Counsel for Applicant.

—

16*th May* 1856.

The Defendant, in this case, having Mr. W. NEWTON as his Counsel, was tried on the 15th March now last past and found guilty of an attempt at murder. On being asked whether he had anything to say, or knew any reason why sentence of death should not be pronounced against him, he answered that he had nothing to say. No motion was made in arrest of Judgment. The Judge, therefore, proceeded to Judgment and sentenced the Defendant to death.

On the following day, 16th March, several other persons having for their Counsel, Mr. NEWTON, were tried on a quite different charge. The last trial was adjourned to the 17th March, when it was discovered, whilst the trial was still going on, that one Charles Olivier Chaulmet, who was then serving on the Jury, was an *alien*.

This circumstance being brought to the notice of the presiding Judge, the trial, on the motion of the Public Prosecutor, and no other jury being in attendance, was immediatety stopped, the Jury discharged, and the prisoners remanded by the Court to the next assizes for trial.

The very same Chaulmet, having been one of the nine Jurors, who, two days before, had sat in Judgment over the Defendant, and had concurred in the unanimous verdict of *guilty* given against the Defendant, led his Counsel, MR. NEWTON, to move the then presiding Judge, on behalf of Armoogon for a stay of the execution of the sentence of death pronounced against him, which motion was granted with consent of the then acting Public Prosecutor.

With the like consent of Her Majesty's Procureur and Advocate General, a day, (*viz :*) 24th April last, was given to Mr. NEWTON, for his intended motion for a new trial. The Defendant having been previously reprieved until after judgment of the Court, on Mr. NEWTON's motion. Accordingly, on the 24th of the said month of April, Mr. NEWTON moved the Court to the following effect: "That the verdict recorded in the matter of the *Queen* v *Armoogon* be set aside and the sentence of death passed on the said Armoogon be annulled and made void, and a new Jury be summoned to try the said matter.

This motion was supported by an affidavit of counsel, setting forth the facts above stated.

Mr. NEWTON rested his motion on the text of Art. 4 of the Jury Ordinance No. 10 of 1850, wherein it is enacted that: "No man, not being "a subject of the Queen, is qualified to serve "on Juries, and no man who hath been convic- "ted of any crime, shall be qualified to serve "on Juries unless he shall have obtained a free "pardon."

He contended that the embodying of these disqualifications in a separate enactment shewe the importance the Legislature attached to th disqualifications specified in that Article, and a anxiety that they should not stand on a leve with the absence of those qualifications requir by Art. 2 of the same Ordinance.

Further that the presense in a Jury of a "*Alien*" was contrary to the spirit of the tri by Jury or of the country defined by BLAC STONE ("VOL. 4. Page 418) to be a trial of th "*Peers* of every Englishman which, as the grea "bulwark of his liberties, is secured to him b "the Great Charter. *Nullus liber homo* cap "*atur, vel imprisonetur aut exulet, aut aliq* "*alio mode destruatur, nisi per legale Judicium* "*parium suorum, vel per legem terræ*" (Gre *Charter*, 9 HENRY III, C. 29.)

An "*alien*" not being the *Peer* of Her Ma jesty's subjects at Mauritius, or in England, s altogether disqualified from sitting in Judgmen between Her Majesty and Her subjects. Hi presence on a Jury vitiates the whole of the pro ceedings had, vitiates the verdict and the Judg ment given thereon. The whole must be se aside and a new trial granted. Indeed, by th "Code d'Instruction Criminelle" of France Art. 381, Paragraph 1st., Alienage is a cause o nullity of trial by Jury.

If this conclusion were denied and if it were contended that the motion was too late; that th presence of an unqualified Juror was matter fo either a peremptory challenge, for cause which should have been made known *before* and *after* the swearing of the Jury for *some cause which in the last case arose after the administering of the oath* (Arts. 23 and 24 Jury Ordinance.) My answer to this objection, said Mr. Newton, is plain:— "That no challenge could be made by the De- "fendant at either of the times stated in those "Articles, for the simple reason that the fact o "Chaulmet being an alien was not known to the "Defendant or his Counsel, until two days after "Judgment pronounced. On the fact being "known, Counsel immediately moved for a stay "of execution of the Judgment, and he now "seeks for the remedy to the evil complained "of, (*viz.*) a new trial, to which end, the pro- "ceedings, verdict, and judgment must be set "aside." (Art. 137, Paragraph 2, *Crim. Proc* Ordinance.)

The Crown Counsel denied that Alienage was *per se*, a cause of nullity of the proceedings had before such *alien* juror; and in assuming *it to be* so, for the sake of argument; the objection came too late.

The disqualification, arising from alienage, being the subject matter of a special article of the Jury Ordinance, is no proof of its being of a more serious character than any of the other various disqualifications arising from the absence of the qualifications required by Art. 2 of the Jury Ordinance, on the part of Jurors, such as over-age, non-age, absence of a clear income of £50, or payment of £50 rent, &c., &c.

The disqualification from alienage, like that arising from over-age, or non-age, is a good cause

of challenge whether peremptory, or special, as the case may be, but cannot and ought not to vitiate the proceedings had, so as to compel the Court to quash the proceedings had, to set aside the verdict returned and to grant a new trial.

The want of qualifications, whether from alienage or otherwise, cannot be urged at this stage of the proceedings ; were it allowed to be urged now, it would be impossible to carry into execution any Judgment of condemnation pronounced by the Court. Motion in arrest of Judgment or in stay of execution would not fail being made on every conviction and new trials moved for on the most futile pretext.

In support of the opinion expressed by the Crown Counsel that alienage in a Juror, like non-age or any other disqualification, was a cause of challenge merely, the Procureur General quoted the case of "*The King* v. *Sutton & ors.*," decided in 1828, by LORD TENTERDEN, C. J. (BARN and CRES, Vol. 8, p. 417.)

"The parties convicted being brought up for "Judgment, Denman, on behalf of *Sutton*, moved "for a new trial, on an affidavit that a special "Juror, who served on the trial, was an "*alien*," "and that this fact was not known to the De- "fendant until *after* the trial."

Sect. 3 (of 6 GEORGE IV C. 50) is expressly applicable to this case, said Denman. "Provided "also that no man not being a *natural born* sub- "ject of the King, is or shall be qualified to serve "on Juries or inquests, except only in the cases "hereafter expressly provided for, which excep- "tion applies to Juries *de medietate*."

The SOLICITOR GENERAL: "The word *qualified* "is applied to "*Aliens*," in the third Section, in "the same sense in which it is applied to other "persons, in the first Section. Now, by the 27th "Section, it is enacted that if any man shall be "returned as a Juror for the trial of any issue "in any of the Courts therein before mentioned, "who shall not be qualified according to this "act, the want of such qualification shall be "good cause of challenge."

LORD TENDERDEN, C. J. gave Judgment in the following term: "The enactment of the "29th Section of this Statute agrees precisely "with that which had before been established "by the common law, for in Co. Lyt. 156. B. "it is stated that *al ens* born may be challenged "*propter defectum patriæ*.

"Now, I am not aware that a new trial has "ever been granted on the ground that a Juror "was *liable* to be challenged, if the party *had* "*an opportunity* of making his challenge. In "the case cited: (*Rex* v *Fremearne*; BARN "and CRES. 5 Page 254) no such opportunity "had been afforded. We ought to be very care- "ful in giving way to such an application, for if "we must grant a new-trial at the instance of a "Defendant, after conviction, we must also do "it at the instance of a Prosecutor when there "has been an acquittal; and it seems to me that "without a precedent we ought not to interfere "in this late stage of the proceedings."

The Rule for a new-trial was, accordingly, refused.

The case cited in his second address to the Court by the Defendant's Counsel, in support of his contrary view of the law, (viz:) the Judgment of ALBOTT. C. J. (in the *King* v *Fremearne*, BARN and CRES, vol. 5. Page 254, given in 1826) in no wise contradicts the law laid down by the same Judge, under his Peerage name of LORD TENTERDEN, in 1828.

The language of the learned Chief Justice ALBOTT is as follows:—"I am of opinion that we "ought to grant a new trial. It appears that in "*Hill v. Yates*, and in *Wray v. Thorne*, the "Court did not think it necessary to yield to an "application of this nature. But in the present "case the person who appeared in the name of "his father, and served on the Jury, was not "qualified by estate so to do, and had not ar- "rived at that age which the law considers ne- "cessary to give competent knowledge to sit in "judgment. I do not see how a challenge could "be taken. Had the party been on the panel, "perhaps the objection should have been a "ground of challenge, and in order to be pro- "perly sworn as a talesman he ought to have "been on some other panel. Rule for a new "trial granted, accordingly."

The facts stated in these two Judgments are quite different from each other. In the case of the *King v. Fremearne*, Chief Justice ALBOTT observed, first: That the name of the Juror who served for his father *was not borne on any jury panel;* 2ndly. That he was *under age*

It was impossible that the Defendant could have instituted an enquiry into the qualifications or disqualifications of one whose name *was not borne on any panel.* He was thereby deprived of his right of challenge. It was, therefore, but fair in the absence of any evil practice on his part, that he should have been allowed a new trial; but in the case subsequently decided by the same Judge, under his peerage name of LORD TENTERDEN, in 1828, the name of the *alien was on the panel.* Had he thought proper so to do, the Defendant might have inquired after the Juror when he would or might have ascertained his want of qualification. An opportunity had been afforded him of challenging the *alien*, and preventing thereby the mis-trial complained of in that case, as in the present. The mis-trial was then, as in this instance, altogether due to his own laches. It was but fair that he should be refused, as he was, a new-trial, as it is but fair that the Defendant in this case should meet with a simular refusal.

Our reasons for this conclusion are the following:

Art. 48 of our Crim. Pro. Ord. requires, that: "Every person against whom a Criminal Infor- "mation has been filed for Treason or Felony, "shall have, if required, a true copy thereof...

....

"As well as a list of witnesses .....

And also a *list of the Jury*, mentioning the

names, profession, and places of abode of the said witnesses and Jurors so as to afford the Defendant the means of inquiring into the character and qualifications of such Jurors, so as to be in a position of exercising his right of challenge either peremptory or for cause agreeably to Articles 93 and 94 of the same Crim. Proc. Ord.; and the better "to enable the Defendant to "make his challenges, he is entitled to have the "whole panel read over, in order that he may "see who they are that appear." (Art. 95, Crim. Proc. Ord.)

The Defendant, in this case, was accordingly supplied with a list of the Jurors. The list bore, amongst others, the names, additions and place of abode of the *alien* Charles Olivier Chaulmet, who served, on the Jury sworn, to try the charge preferred against him, the Defendant.

He thus, had the means afforded him of making the necessary inquiries into the character and qualifications of the juror alleged, at this late hour, to be disqualified by reasons of alienage. Had the Defendant availed himself of the means thus afforded him he might have easily ascertained that the juror Chaulmet was an *alien* and might have challenged him when "*coming to be sworn and before he was sworn*," - and would have thus prevented the mischief now complained of and brought about by his own negligence in not making the required inquiry.

But it is said that the disqualification of the Juror was not known until two days after judgment had been pronounced against the Defendant. —True.— But this disqualification might have been known sooner had the Defendant availed himself of the means of inquiry afforded him by the panel put into his hands. Having by his own laches precluded himself from the exercise of his right of challenge, the rule he now seeks to obtain for a new trial must be refused.

From the autorities cited on both sides may be collected the test by which the Court is to ascertain whether a new-trial is to be granted or refused, here as in England, and it is: Has the Defendant been afforded an opportunity of challenging the disqualified Juror or not? If not, as in the *King* v *Fremearne*, the new-trial *must be granted*; if the opportunity has been afforded him, the new-trial *must be refused*. If it be asked why we should not adopt the law of the French Code of "Instruction Criminelle," but allow ourselves to be guided by the English Jury Act, and decisions of the English Courts as explanatory of our Colonial jury Ordinance, the answer is plain and to be found in the jury Ordinance Art. 25.

"This Ordinance is based on the Jury Act of 6, GEORGE IV, C. 50.

The disqualifications by reason of alienage, dictated by the peculiarities of the political condition of the Island, is the repetition of the 3rd Sec. of the above Act. With this difference that in lieu of the words *natural born* subject, the Colonial Jury Ordinance uses the words *Subject of the Queen*.

By the 27th Section of the English Act, it is enacted: "That if any man shall be returned "as a Juror for the trial of any issue in any of "the Court herein before-mention, who shall not "be qualified, the want of such qualification "shall be good cause of challenge."

No such provision is to be found in our Jury Ordinance, but it may and indeed must be read as a part and parcel of our Jury Ordinance, by reason of the enactment of Art. 25 of the Ordinance, which requires that: "When any ques-"tion may arise as to any procedure, or conduct "in, or respecting any matter in the trial by "Jury, not herein provided for, the law of "England shall be followed and rule the point "or question at issue."

Now is the point which the Court is called upon to decide, expressly provided for or not, by our Jury Ord.? Certainly not. Our Ord. is silent as to whether the want of qualification is a good cause of challenge or not. To ascertain this we must necessarily refer to the English Jury Act, which we are directed to take as our rule and wherein we find, in section 27, that the want of qualification shall be a *good cause* of challenge.

Having ascertained from the English Act, the want of qualification to be a good cause of challenge. We are next to enquire when the challenge is to be taken? Our Criminal Procedure Ord. requires that the Juror be challenged "as he comes to be sworn and *before* he is sworn;" (Art. 93) "and no party can, if right, challenge "the array or any particular Juryman *after* the "swearing of the Jury," unless, for some cause which arose after the administering of the oath. The cause of the challenge set forth in this case, (*viz.*) alienage on the part of Chaulmet, did not arise after the administering of the oath. The challenge, under this art. is therefore clearly impossible.

The disqualification complained of existed prior to Chaulmet being sworn, and might have been easily ascertained by the Defendant, had he made a proper use of the Jury List put into his hand, bearing the names, profession and place of abode of Chaulmet, for the very purpose of enabling him to make all necessary inquiries so as to be in a position to exercise his right of challenge at the proper legal time. His laches in not making use of the panel for the end contemplated by the law, cannot do away with the fact, that by the delivery of the panel to him, an opportunity of challenge has been afforded the Defendant. Hence, his objection comes to late, whether reference be had to Arts. 93 and 94 of our Criminal Procedure Ordinance, or to the authorities of the cases cited.

This application for a new Trial must therefore be refused and is accordingly refused.*

* See in BRUZAUD'S *Reports*, Pages, 148, 161, 206, 217, in September and December 1843, a criminal case where two Assessors, having been challenged as Aliens, by the accused, after the swearing of the first witness for the Crown, the case was postponed to the next Session of Assizes, where the prisoner was convicted, although he had objected against the right of the Crown to enter new proceedings against him.

SUPREME COURT.

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DÉBITEUR PRINCIPAL,—GARANT,—CLAUSE DE "FOURNIR ET FAIRE VALOIR." ARTS. 1693, 1694, 1695, C. C.

Par la clause de "fournir et faire valoir" le Cédant garantit la solvabilité du Débiteur jusqu'au jour de l'exigibilité de la créance transportée, et ne reste lié après cette date que lorsque le défaut de paiement lui a été notifié lors de l'échéance de la dette.

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PRINCIPAL DEBTOR,—WARRANTY.—CLAUSE OF "FOURNIR ET FAIRE VALOIR."—C. C. ARTS. 1693, 1694, 1695.

By the clause of "fournir et faire valoir" the assignee binds himself to pay in default of the principal debtor when the claim shall become due, but he shall not be bound after that date if the non payment of the claim by the principal debtor has not been notified to him at maturity.

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HERVÉ, the wife,—Plaintiff,

Versus

F. WHORNITZ, — Defendant.

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Before:

The Honorable MR. JUSTICE BESTEL, and

The Honorable Mr. JUSTICE COLIN.

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J. COLIN;—Of Counsel for Plaintiff,
A. PISTON;—Plaintiff's Attorney.
G. GUIBERT;—Of Counsel for Defendant,
J. GUIBERT;—Defendant's Attorney.

—

16*th May*, 1866.

The Plaintiff, the wife of a gentleman who is now an inmate of a lunatic asylum, obtained a Judge's Order to authorize her to institute proceedings against the Defendant for the matters and things which shall be presently set forth. She, accordingly, on the 4th October 1865, brought her action to recover from the Defendant, the sum of $2,195.44 with interest, from February (9th) 1864, up to the day of service of the Declaration, under the following circumstances.

It appears that by two notarial deeds bearing date respectively November (10th) 1860 and February (2nd) 1861, the Defendant transferred to the Plaintiff's husband, a claim of $5,000 due to him by Ernest and Ferdinand Letourneur and payable as follows:

$2,000 on November 15th 1860.
1,000 on December 15th 1860.
1,000 on November 15th 1861.
1,000 on December 15th 1861.

together with interest at the rate of 7 o|o per annum, due from November (15th) 1859, upon the sum of $4,000 and upon the sum of $1,000 from Nov. 15th 1860. The assignment of the claim was made for and in consideration of an equal sum of $5,000 paid by the assignee to the assignor, the assignor binding herself to *fournir et faire valoir* the same.

Part of the sum thus assigned to Hervé has been paid, and the amount claimed to wit: $2,195.44 is the balance remaining due to the Plaintiff.

The Defendant pleaded 1o.: That the Plaintiff had no right of action; 2o. That he gave no warranty; 3o. That the action at any rate was premature in as much as the principal debtors and the surety had not been sued and exhausted and their inability to pay the claim had not been legally established. That, at any rate, when he, the Defendant, assigned to Plaintiff's husband the claim in question, on Ernest and Ferdinand Letourneur and Mrs. Meistre, he, the Defendant, did not promise to secure payment of such claim; that his sole promise was the one well known to the law as a promise "de fournir et faire valoir," and that if the Plaintiff had, when the claim became due, sued Ernest and Ferdinand Letourneur and Mrs. Meistre, those parties were then solvent and would have satisfied the claim which, under his special promise, the Defendant was not then bound to pay.

The Plaintiff, in his Replication, joined issue on all the pleas, and as to the last, averred that when the claim of $5,000 was assigned to Hervé, Ernest and Ferdinand Letourneur, the principal debtors, were already insolvent, and the Defendant ought to have been aware of the fact.

When the cause came on for hearing, Js. COLIN, for Plaintiff, gave an historical account of the facts above stated, and argued that in this case, the warranty given by the Defendant was to the effect of "fournir et faire valoir en capi- "tal et intérêts, de Made. Meistre et de M. "Whornitz." That clause bound directly the surety. Hervé had become a lunatic; that was the cause of the delay. His Curator had now recovered that part of the claim transferred which was secured by hypothec, but had failed to receive the balance not so secured, and was therefore driven to act against the surety. In May 1862, Ferdinand Letourneur had been levied upon and his estate placed under sequestration, and before that, Ernest Letourneur had been condemned for debts which he had not satisfied.

G. GUIBERT, for Defendant.—The Defendant is not bound, because the Plaintiff was bound before applying to him, to discuss the principal debtors, which has not been done. The war-

[illegible]

Hervé cited POTHIER [illegible] Vol. [illegible]
MARCADÉ, Vol. VI., Art. 1695.

J. Cook, in reply. My friend's law may be correct, but does not apply. Mrs. Meistre was [illegible] of the claim [illegible] transferred by Whornitz to Hervé, and Hervé has a right to [illegible] immediate [illegible] or to [illegible] Mrs. Meistre is not a surety but a vendor, and the Plaintiff has his choice to sue her or his assignor.

TROPLONG, *Vente*, Vol. XI., page 148.
CODE CIVIL, Arts. 2021 and 2022.

By the special clause in the contract, Whornitz has bound himself not as surety but directly. We have discussed the principal debtors, and by such discussion the secured portion of the claim was paid; the claim was thus reduced from $3000 to $2195 11. We could not claim a balance before knowing to what amount the claim was secured and to what amount it remains unsecured.

JUDGMENT.

The Plaintiff, in this case, is the assignee of a certain claim originally due by Messrs E. and F. Letourneur to Mad Meistre, by the latter transferred to the Defendant and by the Defendant transferred to the Plaintiff, under a special warranty, of which we shall presently have to examine the force and bearing. The claim was partly secured by hypothec, and partly left unsecured; the portion secured has, it appears, been realised. The balance left unpaid. The Plaintiff, therefore, has brought this action to recover that balance from the Defendant, under his special warranty.

The claim was to be paid by the principal debtors by instalments, of which the last was due on 15th December 1861. The Defendant complains, and save the liability which he may have to discharge under his special warranty, justly complains that no notice was given to him until the year 1865, of the non-payment of the debt by the principal debtor. In principle, and as a rule, the Defendant should be discharged; for if a surety binds himself to pay, in default of the principal debtor, a certain claim, on a day [illegible] such surety is discharged if by the act of the creditor or by his negligence the claim or securities which give value to the claim have disappeared. It is in fact the same principle [illegible] law which compels the holder of a [illegible] or payer of a bill of exchange [illegible] notice of [illegible] to the endorsers of [illegible] and drawer and endorser of the bill. The creditor cannot be allowed to suffer years [illegible] may have will sometimes [illegible] his recourse [illegible] the sureties, if called [illegible] might then secure their own [illegible] principal debtors to [illegible] the creditor [illegible], two modes of [illegible] illusory when time has [illegible] have disappeared [illegible] become insolvent. That [illegible] in MARCADÉ, Vol. [illegible] and TROPLONG VENTE: II, [illegible]. DUVERGIER II, 27[illegible], and admits now, *cetera paribus* of no doubt.

If the case stood thus alone, we could have [illegible] Articles 1693, 1694 and 1695 of the Civil Code, that the Defendant would be free from all liability, for there is no doubt that when the claim was assigned, it was a claim, and as a rule the assignor never answer for the solvency of the principal debtor unless he has bound himself to that effect.

But, in the case before us, there is a special warranty, and a warranty in terms which are often met with and the meaning and force of which cannot now be the object of any reasonable doubt.

The assignor bound himself "de fournir et faire valoir en principal et intérêts, pour M. Hervé toucher et recevoir de MM. E. et F. Letourneur, Mme Meistre, M. Whornitz, ou de qui il appartiendra."

Upon the force of that special warranty the case must turn.

It is settled law that the assignor who promises to "fournir et faire valoir" warrants the solvency of the debtor of the claim assigned at the time of the assignment; now does it extend beyond the very moment of the assignment? We are of opinion that it does, but not to the extent which the Plaintiff's case would require. These words "fournir et faire valoir" secure the assignee, as against the assignor, from all chances of loss arising from the debtor's insolvency up to the moment that the claim assigned *is due* "Ils garantissent," says TROPLONG, (*Vente* 11, No. 939) "le cessionnaire de tout danger pour le temps qui s'écoulera jusqu'à l'époque du paiement." But even when the assignor is not answerable "*rectâ viâ*," he is only bound if the debtor of the claim assigned has been discussed and is insolvent.

If, then, the claim assigned has not, *on becoming due*, been claimed from the direct debtor of the same, so that such debtor's assets be discussed and applied to the payment of the same or the debtor proved, after due process of law,

to be then insolvent, the assignor will not be liable. And this is right not only because it is the clear deduction from the Articles of the Code above cited and the clear construction put upon the law by the best authorities, but because it is consonnant with the true principles of Justice that, if a debt is due by *Marcus* on a day certain, unless there be a special contract to the contrary, the co-debtors who are not to pay in the first instance, and *à fortiori* the sureties, must get the personal notice, and not be placed, by the creditor's negligence, in a condition worse than that which they are entitled to hold.

In this case the last instalment due upon the debt assigned became due in December 1861. Notice was only given to the Defendant in 1865, and even then there is no proof that the principal debtors E. and F. Letourneur and Mrs. Meistre, the present Defendant's own assignor, could not have paid the debt when it became due. There is proof that one of the Letourneurs was levied upon in 1862, there is absolutely no proof that any of the three persons mentioned, if duly sued in December 1861, would not have satisfied the claim.

It is said that, in the contract before us, Whornitz the Defendant said: "fournir et faire valoir" "pour Mr, Hervé toucher et recevoir de Messrs. Letourneur, Mme. Meistre et de Mr. Whornitz," and the Plaintiff argued that the insertion of the Defendant's name in the clause carried the contract farther than the ordinary bearing of "fournir et faire valoir" warrants.

We are of opinion that, whether the name of the assignor be inserted or not, the words "fournir et faire valoir" extend so as to reach him; otherwise they would have no sense, only they have the sense and force given them by the law, but no more; they compel the assignor to pay, if the debtor is insolvent, when the debt becomes due, and that sometimes may be several years after the contract, but they do not protect the creditor who does not act when the debt becomes due; in a word they do not prolong the liability of the assignor beyond the term legally meant by the "fournir et faire valoir" clause.

For, in reality, that is the real question: Up to what moment is the assignor answerable? The insertion of the name of the assignor might be construed so as to imply that the assignor waives the benefit of the previous discussion of the debtor. We give no opinion as to this, but it cannot mean that having contracted to be bound, in terms now clearly defined in French law, to be liable up to a certain day, he shall be ever after liable, even without personal notice of non-payment, and without clear proof of the debtor's complete insolvency.

There is a mode by which an assignor may contract to be bound directly and without discussion; such contracts are clearly legal, but they must be clear; the intention of the parties to derogate from the enactments of the Code, which provides for ordinary cases, must be apparent.

Under the clause before us, the assignor Whornitz was surety solely if the debtor became insolvent *before* the stipulated date of payment; even then he ceased to be answerable if the debt were lost by the act or negligence of the assignee.

Under the same principle, LOYSEAU held, and TROPLONG after him, and we have not a doubt of the matter, that if the assignee gave time to the debtor to pay, the assignee's liability would not be extended beyond the original term, except, of course, by consent. We are, therefore, of opinion that Judgment should be entered for the Defendant, with costs.

SUPREME COURT.

RÉSOLUTION DE VENTE,—ACQUÉREUR EVINCÉ,—RESTITUTION DU PRIX DE VENTE,—AYANT-CAUSE DU VENDEUR,—GARANTIE,—INTÉRÊTS,—DOMMAGES-INTÉRÊTS,—FRAIS,—ARTS. 1629, 1630 C. C.

En cas de résolution de vente les sommes reçues par le vendeur personnellement et celles payées à ses ayant-cause, en décharge de ses engagements, devront être restituées à l'acquéreur évincé avec intérêts à dater du paiement.

Lorsqu'il a été stipulé qu'il n'y aurait pas de garantie, l'acquéreur évincé n'a pas droit à des dommages-intérêts.

L'acquéreur évincé qui a payé son prix au cessionnaire du vendeur n'a pas droit de réclamer la restitution de ce prix du cessionnaire personnellement.

CANCELLATION OF SALE,—EVICTED PURCHASER,—RESTITUTION OF SALE PRICE,—ASSIGNEE OF THE VENDOR,—WARRANTY,—INTEREST,—DAMAGES,—COSTS,—ARTS. 1629, 1630 C. C.

The cancellation of a sale shall render imperative the restitution of the sum received by the vendor personally, and also those paid on his account and in discharge of his debts to his assignees, with interest on both sums from the date of the payment.

Where it has been stipulated that there should be no guarantee, no action in damages lies in case of eviction.

The evicted purchaser who has paid his purchase price to the assignee of the vendor has not the right of claiming back such price from that assignee personally.

BLACKBURN,—Plaintiff,

Versus

MAGON AND ORS.,—Defendants.

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Before :

His Honor the CHIEF JUDGE, *and*
The Honorable MR. JUSTICE BESTEL.

—

HON. V. NAZ,—of Counsel for Plaintiff.
J. G. TESSIER,—Plaintiff's Attorney.
E. DUPONT, – of Counsel for Henry de Boucherville.
E. DUCRAY,—Attorney for same.
A. LEGALL,—of Counsel for vendor's assignees.
V. DELAINÉ,– Attorney for the same.
J. L. COLIN,—of Counsel for Mrs. Vincent.

—

16*th May*, 1866.

It appears, from the Declaration, that the heirs of the late Mr. and Mrs. Magon de St. Ellier, on the 8th day of September, 1864, had put up for sale, by licitation, a certain landed Estate situate at Moka, alleged to be 45 acres in extent.

However, previous to the sale taking place, a distraction was ordered by the Master, of 10 acres claimed by Felix Barcade and others, thus reducing the extent of the ground to 35 acres.

The Plaintiff purchased the 35 acres for the principal sum of ₹3,187.50c., bearing interest at nine per cent from the date of the sale.

On the production of the certificate of the Conservator of Mortgages, and in pursuance of the conditions of the "Cahier des Charges" having reference to the payment of the purchase price, the Plaintiff paid the vendors or assignees, the several sums respectively due to them, as appears from a notarial act before Notary Pelte and his fellow, of the 6th May 1865.

Since such payment, which was effected without the exercise of any pressure on the part of his vendors or assignees, but of his own free will and accord, some further portion of land, (*viz.*) 17 acres and ¾ of an acre were claimed by several persons to whom the Plaintiff has been judicially ordered, with costs, to restore the possession thereof.

It is further stated, also, in the Declaration, that the Plaintiff is threatened with a further reduction of 8 acres of land, claimed by the several purchasers thereof, whereby the Plaintiff's rights would only extend over 9 acres of land about, and altogether unfit for the purposes he had in view on purchasing.

The several facts above stated were brought to the notice of the vendors or assignees. They were summoned to put an end to the grievances complained of and to deliver to Plaintiff the subject sold.

The summons was unheeded. Hence the present action.

The Declaration concludes with a prayer for a Judgment rescinding and cancelling the aforesaid Judgment of adjudication of the 8th September 1864, and condemning the Defendants, the co-vendors, (*viz.*) the divorced wife of Adolphe Vincent, Ange Magon de St. Ellier, Henry de Boucherville and Alphonse de Boucherville, jointly and *in solido*, to pay to the Plaintiff the sum of ₹6,000 for restitution of money, damages, and all costs of suit. And the assignees and holders of the rights of the above named co-vendors (*viz*:) Ronchetti the wife, Arthur Raynaud and Denis de Boucherville, jointly and *in solido* with the co-vendors, to pay and refund the respective sums of money received by them, with interest thereon at nine per cent from the date of the Judgment of adjudication to this day.

On the cause being called for trial, E. DUPONT, on behalf of Henry de Boucherville, moved the Court that the said Henry de Boucherville be put out of the cause, he having assigned his share in the purchase price to one Denis de Boucherville.

This motion was assented to by the other parties in the cause, with the exception, however, of A. LEGALL who, on behalf of his clients, objected to the motion, on the ground that it was important for the protection of his client's interest that DUPONT's party do continue a party in the cause.

LEGALL's objection having been allowed and DUPONT's party maintained in the cause, Hon. V. NAZ was opening his case when J. L. COLIN, for the divorced Mrs. Vincent, admitted that there was in this matter a sufficient cause for rescinding and cancelling the adjudication, as prayed for. He further expressed his assent to his client refunding the sum received by her, disputing however the rights of Plaintiff to the damages and arrest in execution asked.

Hon. V. NAZ, on the other hand, whilst maintaining his right to damages and to interest, announced at the same time his intention of not insisting in this case on the prayed for arrest in execution. He accordingly directed his attention to the question of damages and contended, on the strength of Art. 1630, C. C. that the damages claimed were due, as well as the restitution of the purchase price, the interest of such price from the date of the sale, and the costs incurred by the demand in warranty, and those incurred for securing his quiet enjoyment of the subject purchased, which costs have been laid to his charge by the Moka District Court.

J. L. COLIN replied that, by Art. 1 of the conditions of the "Cahier des Charges," it is expressly stipulated that: "the purchaser or purchasers shall take possession of the property "in the condition and state in which it will stand

" on the day of the final sale thereof, without any " recourse or guarantee whatsoever for inaccu- " rate description or any deficiency in measure- " ment, extent or otherwise and without any in- " demnification or diminution thereof." Such being the case it is self evident that the article quoted by HON. V. NAZ, which refers to a case where " la garantie a été promise ou qu'il n'a " rien été stipulé à ce sujet," is wholly inappreciable to the case now before the Court ; that reference must be made to Art. 1629 C. C., to ascertain the extent of the damages claimed against the Defendant Vincent.

Art 1629 C. C. is thus worded :

" Dans le même cas de stipulation de non- " garantie, le vendeur, en cas d'éviction, est tenu " à la restitution du prix, à moins que l'acquéreur " n'ait connu, lors de la vente, le danger de l'é- " viction, ou qu'il n'ait acheté à ses périls et ris- " ques."

The restitution of the price is the only indemnity allowed by law on the eviction of the purchasers from the land sold. To this indemnity alone he is entitled, and he cannot lay claim to any other. To this indemnity the Defendant has already expressed her assent by her recorded admission that she was bound to the restitution of the sums which she has personally received.

Having enquired into the extent of the liability of the vendors, (heirs Magon de St-Ellier.) HON. V. NAZ next applied himself to show that the assignees of those heirs were bound like the heirs to whose rights they have succeeded, to refund to the evicted purchaser the sums paid by the latter.

HON. V. NAZ rested his argument on several Decisions of the French Courts and opinions of several commentators laying down as law that an ousted purchaser, on a Judicial sale, whether forced or otherwise, who had paid the several collocated creditors of the Estate sold, had a right to call upon them for the restitution of the sums so paid to them respectively. This conclusion is based on the wording of Art. 1377, C. C. wherein it is laid down that : " Lorsqu'une personne " qui, par erreur, se croyait débitrice, a acquitté " une dette, elle a droit à répétition contre le " créancier. Néanmoins ce droit cesse dans le cas " où le créancier a supprimé son titre par suite du " paiement ; sauf le recours de celui qui a payé " contre le véritable débiteur (Art. 1376, C. C.) " Celui qui reçoit par erreur ou sciemment ce " qui ne lui est pas dû, s'oblige à le restituer à " celui de qui il l'a indûment reçu."

When paying his price the purchaser fully intended to discharge a debt legally due by him. in consideration of the subject sold to him. He did so with the view of securing to himself the ever undisturbed position and enjoyment of the subject purchased. His eviction therefrom shows that the consideration given ought not to have been so given, that the price paid has been erroneously paid and received ; hence his right to claim back the price so erroneously paid by him ; hence the necessity, on the part of the receivers of that price, to refund the amount so unduly received.

Art. 1235, C. C. " Tout paiement suppose " une dette : ce qui a été payé sans être dû est " sujet à répétition."

Whether the sum has been paid to the vendor, or to his creditors or to his assignees, which ever of them has received a sum not due is liable to an action in repetition of the sum so erroneously paid and received.

Applying this article to the case before the Court, said the Hon. V. NAZ, we find an Estate of which the vendors believed themselves to be the legal owners, is by them put up for sale before the Master of the Court. Blackburn purchaser, pays his price to his vendors and assignees, of course in the expectation of a perpetual enjoyment of the Estate sold, and purchased by him. As long as the Estate continued in his hands, he was fully justified in paying his purchase price. Indeed he was bound to do so on penalty of a cancellation of the sale.

However, on his attempt at taking possession of the Estate purchased, he finds himself ousted of the most valuable part of the subject sold, and to such an extent that one of his vendors does not hesitate to recognize his right to a cancellation of the sale, and to the restitution of the sum received by her, in payment of her share, in the amount of the purchase price; thus acknowledging the existence of an error shared in by the two parties, the one wrongly believing herself entitled to the payment of the sum received by her which she is now willing to refund; and the other erroneously believing himself bound to a payment, which, his subsequent eviction showed he was not bound to make.

Whether the sum paid and received were unduly paid to and received by a vendor, or to or by his assignees, is altogether immaterial. The assignee, as the representative of the vendor, must be liable to the same obligation as the vendor, he having succeeded to all the rights of the vendor against the obligee.

The monies paid to him are supposed, in law, to have been paid to the original vendor, the assignee being, in law, none other than the vendor. These monies so received by the assignee must be refunded saving his recourse against the original vendor, whether the latter be or be not solvent.

If solvent. the assignee cannot fail recovering the sum refunded by him, his assignor being bound, in law, to guarantee the existence of the right assigned. (Art. 1693, 1694, 1695 C. C.) Should his assignor be insolvent his recourse must prove a failure, it is true, but he is nevertheless bound to refund the sum by error paid to, and by error received by him.

Not so, said LEGALL, on behalf of the assignees. The monies paid to them were not so paid by error, but paid in extinction of the just debt legally due to the assignee, for consideration.

The debt was due when the assignment was made, and the consideration money paid to the vendor by the assignee. The eviction now complained of had not taken place. The sum was therefore due and demandable. There was no possible error on either side, on this point, at the time of payment. Can the subsequent eviction in any way affect such a transaction? True it is that the purchaser not having the undisturbed possession and enjoyment, has an action against his vendors for the cancellation of the sale and for the refunding of the sale price paid; for, the first obligation of the vendor is that he do guarantee to the purchaser the peaceful possession of the subject sold. (Art. 1625, C. C.) " Et quoi- " que lors de la vente il n'ait été fait aucune sti- " pulation sur la guarantie, le vendeur est obligé, " de droit, a garantir l'acquéreur de l'éviction " qu'il souffre dans la totalité ou partie de l'ob- " jet vendu "..... (Art. 1626 C. C.)

The Article last quoted forms part of the contract of sale and is to be found under the rubric of " § 1re De la garantie en cas d'eviction."

Throughout, the text speaks of the vendor as bound to maintain the purchaser in the peaceful enjoyment and possession of the subject sold, and in default thereof to indemnify him according to the various rules laid down in the texts.

Of course what is said of the vendor applies to his heirs, who by succeeding to the rights of the vendor, have, in like manner, succeeded to his liabilities.

But the same privity of interest does not prevail between an assignor and his assignee of *part only* of his rights. Therefore it is that the law has wisely abstained from assimilating the assignee to the vendor or his heirs."

As between assignor and assignee an assignment is undoubtedly a sale; under the head of " Transports de Creances *etc.* and in Art. 1692, C. C., we read: " *La Vente* ou cession d'une créance comprend les accessoires.....

In Art. 1693, C. C.: "Celui qui vend une cré- " ance doit en garantir l'existence au temps du " transport, quoi qu'il soit fait sans garantie."

The same remedy is afforded by the law to the assignee as to the purchaser who have one and the other an action against their vendor to compel performance, on his part, of his obligation and in default to claim an indemnity.

As to third parties (*viz.*) the assigned debtor, the assignee is the representative of the assignor and his irrevocable attorney, *a Procurator* of a peculiar character, (*viz.*) *in rem suam*, and as such, entitled to receive and apply to his own purposes the sum assigned to him on receipt thereof.

Payment to an ordinary procurator is payment to the principal. Had payment of a sum not due been made to an ordinary agent for and on account of his principal and the amount received paid over to his principal, would the party who had erroneously paid render the agent liable for the restitution of the sum received by him? No, the action in restitution would have to be directed against the principal.

Had the latter become insolvent in the meanwhile between payment and action brought, would not the Plaintiff have to bear the loss?

Why should not the result be the same in reference to an assignee, for consideration. It is because of the apparent advantage derived under the assignment by this species of agency of applying to his own use the monies so received in payment of the sum paid by the assignee to his principal the assignor, by anticipation?

The purchaser of an Estate and the purchaser of the whole or part of the price of the same Estate are alike purchasers from one and the same vendor, but of distinct subjects.

How can either of these purchasers, in the absence of all privity of interest between them, be liable to the other for the wrong done to either by their vendor, respectively?

In law, the assignee is a stranger to the contract of sale between vendor and vendee. The assignment made to him was made for due consideration.

He is therefore entitled to retain the sum paid to him by the assigned debtor.

Equity forbids that an assignee for good and valuable consideration should be made answerable for the laches of a purchaser who by greater diligence might have protected himself against any loss and prevented the coming into existence of an assignment which would not have been made, had the purchaser in this case, for instance, been more active in taking possession of the estate purchased. Sooner informed of the real estate of matters, he would have refused payment of his purchase price, which, be it repeated, was never asked from him either judicially or extra-judicially. This would have guarded the vendors from making any assignment and deterred third parties from the purchase of rights so uncertain.

But the purchaser attempted to enter into possession, only after payment of his purchase price, having thus led purchaser, assignor, and assignee, into the error complained of, he now seeks relief at the expense of third parties altogether innocent of the wrong imputed to them."

" In law the vendor, and the vendor alone, or his heirs are liable to the indemnity prayed for, and not the assignee who are utter strangers to the contract between vendor and vendee."

" In equity the assignees cannot be subjected to the liabilities attempted to be fixed upon them, they having received but what was due to them or to their assignors, at the date of payment. "

JUDGMENT.

We are called upon, in this case to express our opinion on two points of law which have been fully argued. As it is but too often the case,

ve have had and still have to regret the great lifference in the opinions expressed at different imes by the French Courts of law and by the commentators of the French CODE, and especially on the second part relative to the liability or non-liability of assignees to refund to an evicted purchaser the sum received by them in payment of their purchase price.

This difference of opinion makes it the more imperative upon us to ascertain the law on the matter before us from the letter and spirit of the law itself.

The eviction of the purchaser having been admitted, for the divorced Mrs. Vincent, by COLIN, to be such as to justify the cancellation of the sale as prayed on the one hand, and to render imperative the restitution by his client of the sum received by her *personally*, will relieve the Court from further dwelling upon it but for the purpose of ascertaining :

1o. The extent of the restitution to be made, whether it shall embrace not only the sum receivedby the divorced wife Vincent personally, but also the sums paid on account to her assignees.

On this head we have no hesitation in finding that the restitution is to embrace the sum paid to Mrs. Vincent personally and those paid to her assignees, on her account, and in discharge of her debts to them.

2o. Whether interest is to be paid on the sums received by her personally or to extend to the sums received by her assignees ?

Having found Mrs. Vincent liable to the restitution of the sums received by her and her assignees, interest is to be allowed on sums so received by herself and her assignees. Having had the enjoyment of the sums paid, whether personally or through her assignees, from the day of payment, it is but fair that the purchaser should be indemnified for the loss of interest sustained, since he parted with his money.

3rdly. As to the damages prayed for :

The plaintiff's authority for claiming the damages allowed by § 4th of Art. 1630 C. C. appears to us not to have any bearing on the facts of this case. The Article quoted provides for a different state of matters, (*viz :*) for the case when " La garantie a été promise," whereas in the case before us it has been stipulated that there should be no *garantie*, thereby bringing the matter within the provisions of Art. 1629 C. C., which says : " Dans le même cas de stipulation de non-" garantie, le vendeur, en cas d'eviction, est tenu " à *la restitution* du prix."

4thly. To the costs incurred below, for securing the peaceful enjoyment of the subject purchased. These costs and interests which are allowed by Art. 1630 C. C. are not mentioned in Article 1629, C. C.

Hence, we infer that the damages and costs rayed for were not contemplated by the legislapure whenever a *non-garantie* has been stipulated. We are therefore bound not to allow any further damages than the restitution of the money paid, agreeably to the provision of Art. 1629, with interest thereon, though such interest be not mentioned in Art. 1629, C. C., because it is but fair as above stated that the Plaintiff should be indemnified from any loss arising from the non-enjoyment of the monies of which Mrs. Vincent, in the meanwhile, had the entire disposal, and paid debts which, unpaid, would have produced interest until payment.

We now proceed to consider the second part in this case, and to enquire whether the purchaser who has paid his purchase price to the assignee of the vendor, has a right to recover back such price from the assignee personally, on the purchaser's eviction from the real Estate sold to him.

The solution of this point is not without its difficulties. The Court of law and the commentators who have given an affirmative answer to the question before us, and those who have answered it in the negative have come to those contrary conclusions by assimilating the assignee to a collocated creditor paid by a subsequently evicted purchaser.

But how far the collocated creditor is or is not liable, is a question on which Courts of Law and writers are anything but agreed. Some of them are for the liability of the collocated creditors to refund the sums by them received ; others are for their non-liability to do so, holding the vendor to be sole liable ; others again are for joint-liability of vendors and collocated creditors.

The argument in support of the liability of the collocated creditors is based on the enactment of Arts. 1376 and 1377, C. C. " Celui qui " reçoit par erreur ou sciemment ce qui ne lui " est pas dû, s'oblige à le restituer à celui de qui " il l'a indûment reçu.

" Lorsqu'une personne qui, par erreur, se cro-" yait débitrice, a acquitté une dette, elle a le " droit de répétition contre le créancier."

Assuming the liability of collocated creditors, by reason of an alleged error on the part of an ousted purchaser when paying his purchase price, it does not necessary follow that payment by an ousted purchaser to the assignee of his vendor is to be vitiated for the same cause.

Error may exist in the one case and not in the other.

We cannot shew the *non-existence* of the vitiating cause in the payment to an assignee, better than by the following quotation taken from the 4th Vol. *Revue pratique du Droit Français*, page 403. " Vainement dirait-on que " tout paiement suppose une dette, et que ce " qui a été payé sans être dû est sujet à ré-" pétition ; car ce qui a été payé était bien dû " par celui qui déboursait et à celui qui rece-" vait ; ce qui rend les articles 1376 et 1377 du " CODE NAPOLÉON inapplicables. Le cession-" naire était bien légitimement créancier, cela " est incontestable, et l'acquéreur était évidem-

" ment débiteur tant qu'il n'avait pas subi d'é-
" viction ; en sorte que jusqu'à perte de l'im-
" meuble il avait un *motif* légal de payer ; l'ar-
" ticle 1650 du même Code portant que l'obli-
" gation principale de l'acheteur consiste à faire
" le paiement dans les termes et les conditions
" du contrat, insistera-t-on que si l'acquéreur
" avait dû prévoir l'éviction, il n'aurait pas payé,
" et que par conséquent ce n'est que par er-
" reur qu'il l'a fait ? Mais l'Article 1377 sup-
" pose un paiement effectué par Jean, tandis
" qu'il devait l'être par Pierre, ce qui le prouve,
" c'est la dernière disposition de cet article qui
" porte : " Néanmoins, ce droit (de répétition)
" cesse dans le cas où le créancier a supprimé
" son titre par suite du paiement, sauf le re-
" cours de celui qui a payé *contre le véritable dé-*
" *biteur* ; or, quel est le véritable débiteur de la
" somme payée par l'acquéreur au cessionnaire,
" au moment où se faisait ce paiement, et où il
" n'y avait aucune éviction ? Evidemment c'é-
" tait cet acquéreur, cet acquéreur seul. Pou-
" vait-ce être le vendeur ? A aucun titre—ce
" dernier ne devait absolument rien à son ces-
" sionnaire, et si celui-ci se fut adressé à lui, il
" l'aurait renvoyé à son acquéreur qui se trou-
" vait alors dans la plénitude de ses engagements
" et dont l'obligation principale consistait à faire
" ce paiement. S'il en était autrement à quoi
" servirait une cession ? "

This argument appears to us conclusive against the rights of an evicted purchaser to recover from the assignees the amount of the purchase money paid to them, not by error, but in discharge of an existing and lawful debt at the date of payment.

The action as against the assignees is dismissed, with costs against Blackburn, Mrs. divorced Vincent and Heirs Magon.

On the action as against Mrs. divorced Vincent and other heirs Magon, Judgment is to be recorded for Plaintiff, for restitution of the price respectively received by the several heirs, with interest at 9 o|o from date of payment by Plaintiff, and costs against Mrs. divorced Vincent and the heirs Magon.

SUPREME COURT.

CESSION DE BIENS,—DÉBITEUR MALHEUREUX ET DE BONNE FOI,—PREUVE.

C'est à celui qui veut faire une Cession de biens à prouver qu'il a été malheureux et de bonne foi, même lorsqu'aucun créancier ne s'oppose à sa demande.

CESSIO BONORUM,—DEBTOR BEING UNFORTUNATE AND OF GOOD FAITH,—EVIDENCE.

The Petitioner who wishes to make a Cessio Bonorum has to bear the burden of the proof that he has been unfortunate and of good faith, even when no Creditor opposes his Petition.

CESSIO BONORUM L. FOSSOYEUX.

Before :

The Honorable MR. JUSTICE COLIN.

W. NEWTON,—of Counsel for Petitioner.
V. LAVAL,—Petitioner's Attorney.

12*th June* 1866.

THE COURT :

This was an application made by the Petitioner to be admitted to the benefit of a *Cessio Bonorum*, the object aimed at being the protection of the Petitioner's body against arrest, but, in no wise, discharge from liabilities, under the Ordinance of 1864.

It appears, from the Petioner's examination, that he has been unfortunate in his cane growing speculations, and although the evidence is necessarily meagre in a case where the creditors have not deemed it necessary either to oppose or to call witnesses, yet so far as it goes, it is sufficient to show that the Petitioner has been of good faith.

In "Cessio Bonorum" cases *the Petitioner has to bear the burden of the proof that he has been unfortunate and of good faith.* I think this Petitioner has sufficiently made out this position, and it is satisfactory to find that his creditors have not objected to his application. I shall allow him to take the benefit of a *Cessio Bonorum* so far as that his person shall be protected as soon as he has signed his assignment to the Official Assignee, who, from the fact that no creditor chose to give notice of his claim, was ordered to act alone. But it is hardly necessary to add that the Petitioner is not discharged from his liabilities. He does not place himself within the provisions of the new Ordinance, and in fact the point was not pressed by him.

COURT OF BANKRUPTCY.

DEUXIÈME FAILLITE,—LIVRES TENUS QUELQUE TEMPS SEULEMENT AVANT LA FAILLITE,—CERTIFICAT,—PROTECTION.

Le failli qui n'aura tenu des livres que peu de temps avant sa faillite pourra être privé de son Certificat et de la protection de la Cour.

SECOND BANKRUPTCY,—BOOKS KEPT SOME TIMES ONLY BEFORE THE DECLARATION OF BANKRUPTCY,—CERTIFICATE,—PROTECTION.

If a Bankrupt has kept no books, save only on the

verge of his failure, the Court may refuse him his Certificate and her protection.

—

BANKRUPTCY M. APOLLON.

—

Before MR. JUSTICE G. B. COLIN, Commissioner.

—

A. PITOT, Bankrupt's Attorney.

—

12th June, 1866.

THE COURT :

This Bankrupt moved for his Certificate which the Assignees contended he should not obtain. The Bankrupt has already been once before the Court, when he obtained a second class Certificate ; he began to trade again very soon afterwards, and fifteen dollars formed the amount of the capital with which he thought he might again set up a shop. The result has been very unfortunate, and, soon after, the Bankrupt was compelled to appear a second time before this Court. He kept no books for the greater portion of the time that he carried on his trade, nor can we find any reasonable trace of his dealings ; when on the verge of his second failure, he opened a book, evidently for the purpose of coming into Court not quite unprepared with books ; but from the book itself, very little can be gathered. Nor has the bankrupt's examination been satisfactory ; a trader must keep books ; the law requires it ; without them it is impossible to follow and to test the trader's dealings, and it is right that he should be punished if he acts in direct violation of the duty which the law makes it incumbent on him to perform. I must refuse this Certificate and also refuse protection.

The Bankrupt may call his creditors before the Court, after a lapse of three years, to renew his application.

SUPREME COURT.

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DIVORCE POUR CAUSE DÉTERMINÉE,—SÉVICES ET INJURES GRAVES,—CODE CIVIL, ART. 231.

—

HUSBAND AND WIFE,—DIVORCE FOR SPECIFIC CAUSE,—CRUELTY,—INSULTS,—BLOWS,—C. C. ART. 231.

—

JOHN THE WIFE,—Plaintiff.

versus

JOHN THE HUSBAND,—Defendant.

—

Before :

His Honor the CHIEF JUDGE, and
The Honorable Mr. JUSTICE COLIN.

G. GUIBERT,—Of Counsel for Plaintiff.
J. SLADE AND BANKS,—Plaintiff's Attornies.

—

Defendant not appearing.

—

13th June 1866.

THE COURT :

In this case, the wife demands a separation "*a vinculo matrimonii*," on the ground of her husband's "*excès, sévices et injures graves.*"

She has established in evidence that the marriage took place about 10 years ago ; that the Defendant is a man of irritable and ungovernable temper ; that for some years past he has abandoned himself to drinking ardent spirits ; that he has reduced himself to poverty and wasted all her means ; that he frequently applied the most abusive epithets to her ; that he has repeatedly stated to third parties that she was unfaithful to him, and frequented brothels ; that he caused their domestics to follow her when she went out, stating that he suspected she was going to a certain house of ill-fame which he named ; that he subsequently confessed that he had knowingly, and falsely made these charges against her ; that he, on one or two occasions, used personal violence to the Plaintiff ; that he has latterly failed to supply her with any means of living, and thrown her and her children on the compassion and charity of her friends and relations.

The SUBSTITUTE PROCUREUR GENERAL has given his conclusions in favor of the Plaintiff's demand.

We are, therefore, of opinion that, on the proof adduced, of which we have just stated the substance, the Plaintiff is entitled to the remedy which she asks.

We therefore admit the Plaintiff's demand, and order that she does, within the time and after the formalities allowed by law, present herself before the Officer of the Civil Status of the Town of Port Louis, who is hereby authorized to pronounce the divorce.

Costs against the husband.

SUPREME COURT.

—

MANDAT ET MANDATAIRE,—LETTRE DE CHANGE OU "CHEQUE."

L'Administrateur d'une propriété sucrière qui, en paiement d'une dette de la propriété, tire une lettre de change ou "cheque" sur le propriétaire, n'est point responsable du paiement de la dette, à défaut du propriétaire, lorsqu'il a fait suivre sa signature de son titre d'Administrateur.

—

PRINCIPAL AND AGENT,—INLAND BILL OF EXCHANGE OR CHEQUE.

The Manager of a Sugar Estate who, in payment of a debt of the Estate, has drawn an Inland Bill of Exchange or Cheque on the owner of the Estate is not bound to the payment of the same conjointly with the owner, when it is apparent on the bill that he has signed in his capacity of Manager.

—

BOULLÉ,—Plaintiff,

Versus

CORNE,—Defendant

—

Before:

The Honorable Mr. JUSTICE BESTEL, *and*
The Honorable Mr. JUSTICE COLIN.

—

J. L. COLIN,—of Counsel for Plaintiff.
E. BOULLÉ,—Plaintiff's Attorney.
HON. L. ARNAUD,—of Counsel for Defendant.
J. PIGNÉGUY,—Defendant's Attorney.

—

16*th May*, 1866.

The Plaintiff, in this case, alleging himself to be creditor of the Defendant upon two cheques or Inland Bills, signed by the latter, had lodged on the 9th January last in the hands of the Honorable James Edward Arbuthnot, in his capacity of Judicial Sequestrator of the sugar Estate *L'Union*, at Flacq, an attachment to secure payment of the amount of the 2 cheques above mentioned.

On the 15th of January last, he obtained a summons calling upon the Defendant to shew cause why the attachment should not be declared good and valid.

On the return of the summons and on the objection of the Defendant to the validation prayed for, the parties were referred to the Court.

The matter was turned into a special Case in which the two cheques or Inland Bills are set out in the following terms :—

" Au cinq Décembre prochain, fixe, je prie M. " E. Bazire de vouloir bien payer à M. J. Piat, " ou ordre, la somme de cinq cents piastres pour " travaux faits sur l'Etablissement *L'Union*. " *L'Union*, le 30 Septembre 1865. F. Corne. " Adm."

" Accepté à payer à l'échéance. E. Bazire, " Mandataire par procuration Auth. des Héri- " tiers Lanougarède. 2 Octobre 1865."

" Payez à M. Léonce Boullé, ou ordre, valeur reçue comptant. Port Louis, 2 Octobre 1865. J. Piat."

" Au quinze Novembre prochain, je prie Mon- " sieur E. Bazire de vouloir bien payer à M. " J. Piat, ou ordre, la somme de cinq cents pias- " tres pour travaux faits sur l'Etablissement " *L'Union*. *L'Union*, le trente Septembre mil " huit cent soixante-cinq. F. Corne, Adm.,

" Accepté à payer le cinq Décembre, Port Louis, " 2 Octobre, 1865. E. Bazire, Mandataire par " Proc. Auth. des Héritiers Lanougarède.

" Payez à Monsr. Léonce Boullé, ou ordre, va- " leur reçue comptant. Port Louis le 2 Octobre " 1865. J. Piat."

These two Cheques or Inland Bills of Exchange not having been paid, the attachment above mentioned was resorted to.

It is admitted in the special Case that the Defendant was Manager of the Sugar Estate *L'Union* when he drew the two Cheques above mentioned, and that the letters "*Adm.*" written under his name meant "Manager" or "Administrator."

It was admitted in Court that the Estate *L'Union* was the property of the Heirs Lanougarède; and that E. Bazire who accepted the Cheques was, at the date of the acceptance thereof, the "Mandataire par procuration authentique" of the Heirs aforesaid.

The question to be decided by the Court is whether the Defendant can be held personally bound to the payment of the aforesaid two Cheques or Inland Bills of Exchange, and whether the Plaintiff has any right to attach monies belonging personally to the Defendant.

JULES COLIN, of Counsel for the Plaintiff, contended that the Defendant was personally liable, and rested this personal liability on the following facts: 1o. The Defendant had personally drawn the Cheques. 2o. That he had drawn on Bazire personally, and not on Bazire as agent of the Heirs Lanougarède. 3o. That he had drawn in favor of J. Piat, or order. 4o. And that he had so drawn as Administrator or Manager of the Estate *L'Union*.

Several articles of the CODE and many authorities were quoted by COLIN, in support of the liability of the Defendant, whom he stated to have contracted in his own name on the several grounds above stated and could not but be personally bound.

He further contended that the addition expressed by the letters *Adm.* far from relieving him from all personal liability, merely strengthened the rights of Plaintiff by pointing out to him another person equally liable, with himself, for the debt now claimed.

HON. L. ARNAUD, on the other hand, argued that there was no doubt that if the Defendant had not divulged, as he had done, by the addition attached to his signature on the Cheques (*viz.*): that he acted only as the Administrator or Manager of "*L'Union*" Estate, the property of the Heirs Lanougarède, represented by E. BAZIRE, the Defendant would have made himself liable

) the Plaintiff and others who might have dealt ith him. Had he not thus taken care to in- rm the original holder of the Cheque, and rough him, the present holder thereof, that he tended not to contract in his own name, he ould undoubtedly have been held, in law, to ave contracted in his own name and on his own count. (Art. 1165 C. C.) But the intima- on conveyed to the original bearer and to the resent holder of the Cheque by the letters *dm*, that he intended to bind himself but in the le capacity indicated by those letters (*viz.*) f Administrator or Manager of the Estate *L'Union*" the consideration for which the heques had been drawn, (*viz.*) for work and bor done on the Estate *L'Union*, the accept- nce of E. Bazire as Agent of the Heirs Lanou- arède, the owners of the Estate "*L'Union*," ated on the very face of the Cheques are so any intimations of the intention of the De- ndant, of binding not himself, but the owners f the Estate, the Administration or Management f which had been committed to his care through heir agent Eugène Bazire. And not having ontracted in his own personal name or his per- nal account, he cannot be, nor is he personally able.

JUDGMENT.

The Cheques, when handed over to Piat, bore hree letters *Adm.*, meaning Administrator or Manager.

This was an intimation to him of the capacity n which the Defendant intended to bind him- elf and of the extent of responsibility he inten- ed to assume.

Had this intimation proved unsatisfactory, Piat might have refused taking the Cheques.

If at the time of the delivery of the Cheques o him, the acceptances of Bazire appeared on he face thereof, this acknowledgment of the au- hority assumed by the Defendant was an addi- ional reason for refusing the Cheques handed ver to him.

But far from refusing the Cheques, Piat ac- epted and disposed of them in favor of the Plaintiff. The latter, assignee of Piat must be ound by the act and deed of his assignor, Piat ever having given credit to the Defendant but n his capacity of *Adm.* administrator or Mana- ger of the estate l'*Union*.

The Plaintiff cannot recover against the De- endant *personally*.

The action must be dismissed with costs.

BAIL COURT.

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—DÉPOSITION DES TÉMOINS,—ENQUÊTE PRELIMINAIRE,—DEVOIRS DU CLERC DE DISTRICT,—ORD. 32 DE 1852, SEC. 5, ARTS. 61, 62, 105, 109.

Le Jugement d'un Magistrat de District n'est pas nul, lorsque les dépositions des témoins ont été prises par le Magistrat et non par le Clerc de District; mais il en serait autrement s'il s'agissait d'une enquête préliminaire, les témoignages doivent alors être pris par le dit Clerc.

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE,—SUMMARY JURISDICTION,—PRELIMINARY ENQUIRY,—CLERK OF DISTRICT COURT,—ORD. 32 OF 1852, SEC. 5, ARTS. 61, 62, 105, 109.

The District Magistrate is not bound to have his clerk in attendance to take down the evidence in criminal cases within his summary jurisdiction but in those cases in which such Magistrate has merely to make a preliminary enquiry, the evidence ought to be taken down by the District Clerk.

FAVORY AND ORS.,—Appellants,

Versus

THE QUEEN,—Respondent.

Before:

The Honorable Mr. JUSTICE COLIN.

E. DUPONT, —Of Counsel for Appellants.
L. DESPERLES,—Appellants' Attorney.
S. J. DOUGLAS,—Of Counsel for Respondent.
J. BOUCHET, —Respondent's Attorney.

23*rd May*, 1866.

This was an Appeal from a Conviction of the District Magistrate of Grand Port. The only point raised by MR. DUPONT, of Counsel for the Appellant, was that the Clerk of the Court was not in attendance to take down the Evidence in the case; that such evidence was taken by the Magistrate himself, against the provisions of the law; that there was consequently no Evidence to ground the Conviction appealed from.

THE COURT:—I am glad that this point should have been once more raised before the Court and fully argued. The question is whether, in a criminal case, within his summary Jurisdiction, the District Magistrate is bound to have his Clerk in attendance to take down the evidence.

I am of opinion that the formalities required by the Ordinance, in cases in which the Magistrate has merely to make a preliminary Enquiry, and is incompetent to give a final Decision, do not apply to those cases which are within his summary Jurisdiction.

Let me say, first of all, that it is by the District Magistrate Ordinance, criminal side alone, that the question is to be decided. This Ordinance, it is quite true, does not modify the organic law of the Country, but it traces out the procedure, it contains the machinery by which the organic law is put in motion, and so far it abrogates the Codes of Criminal Procedure.

Now the text of this Ordinance is, in my opinion, quite clear, and show abundantly what has been the intention of the Legislator:

Arts. 61 and 62 of the Ordinance, under Section 5, (Examination before a Magistrate) provides that the depositions shall be taken down in writing, as nearly as possible, in the very words of the witnesses, and that "*they must be signed by the Magistrate and the Clerk.*" This clearly applies to the preliminary Enquiries. But the law in cases within the summary Jurisdiction of the Magistrate, far from repeating the same enactment, contains a totally different provision. According to the Art. 105, under head: "Summary Jurisdiction," the Magistrate, when the prisoner denies the charge, "*shall proceed to obtain, receive and take down, in writing,*" the depositions of the witnesses. According to the next Article, the Magistrate has also to take down the substance of the prisoner's defence. Art. 109 also provides that "*the Magistrate shall take minutes of the proceedings, throughout the case, and preserve such minutes, together with the informations and depositions.*"

The duties of the Magistrate being thus defined, the Ordinance proceeds to examine those of the clerk. The clerk, according to Art. 100, amongst other duties, has the custody of the Records of the Court, and keeps Minutes of the proceedings thereof, &c.

The difference, between the Magistrate's task and that of the Clerk, is quite clear from these Articles just quoted. The Magistrate *taking down, in writing*, the depositions, or more generally *takes minutes* of the proceedings, and the Clerk *keeps those minutes*. The reason of this difference is very simple. In case of preliminary Enquiries, it is most important that the depositions of the witnesses should be taken down as litterally as possible; the prisoner, who is committed to the Assizes, and who is entitled to a copy of the depositions made against him in the preliminary Enquiries, has a right to a correct and almost literal copy; otherwise his right of cross-examining the witnesses upon what they have said before the District Magistrate, would be paralyzed or curtailed. It is necessary that the prisoner should be enabled to compare what is said against him in the Court of Assizes, with what has been, by the same persons, said in the Court below.

But when a Magistrate sits upon a case which he is competent to decide, what would be the use of the deposition being taken down at full length by the Clerk? The Court of Appeal has no right to try the Decision of the Magistrate as to facts, and as to the Evidence. All the Court of Appeal can do is to diminish the amount of the punishment, and for that purpose the Magistrate has to take down the *substance* of the evidence.

Therefore I am satisfied that the absence of the Clerk from the Court does not vitiate the proceedings in this case, and that in consequence the Conviction ought to be maintained.

But although I am satisfied that there is no nullity arising from the fact that the District Clerk was not in attendance, I must add that I am far from blaming those Magistrates who require the presence of their clerks.

The Magistrate should take down the depositions, if the Clerk does so likewise, there may be no harm; but I have not to decide this point.

In this case the question raised is this: Is a summary Conviction null and void because the depositions have been taken down by the Magistrate, (the Clerk not being in Court?) I am clearly of opinion that it is not.

The Appeal is accordingly dismissed with costs.

SUPREME COURT.

CONTRE-LETTRE,—SOUSTRACTION FRAUDULEUSE ALLÉGUÉE,—INTERROGATOIRE DU DÉFENDEUR,—COMMENCEMENT DE PREUVE PAR ECRIT,—PREUVE TESTIMONIALE REJETÉE,—ARTS. 1341, 1347, 1348, C. C.

Lorsqu'il n'y a pas de commencement de preuve par écrit émanant du défendeur, et que ce dernier aura été examiné sans qu'il puisse rien être inféré contre lui de ses déclarations, la preuve par témoin ne pourra être admise pour prouver la soustraction frauduleuse d'une contre lettre.

L'existence de cette contre-lettre devra avant tout être prouvée.

"CONTRE-LETTRE."—FRAUDULENT ABSTRACTION ALLEGED,—DEFENDANT'S EXAMINATION,—BEGINNIG OF PROOF IN WRITING,—ORAL EVIDENCE REJECTED,—C. C. ARTS. 1341, 1347, 1348.

No oral evidence shall be admitted to prove the fraudulent abstraction of a "contre-lettre," the Defendants having been duly examined and nothing in his declaration going against him, unless the existence of the same should first be established, and there already exists a beginning of proof in writing.

HERMANS AND WIFE,—Plaintiffs,

Versus

GOURDIN,— Defendant.

Before:

The Honorable Mr. Justice Bestel, *and*

The Honorable Mr. Justice Colin.

—

Hon. L. Arnaud,—Of Counsel for Plaintiffs.
J. Pignéguy, —Plaintiffs' Attorney.
J. Colin, —Of Counsel for Defendant.
E. Victor, —Defendant's Attorney.

—

16*th May*, 1866.

In this case, the Plaintiffs, in the respective capacities assumed by them, in the Declaration, seek from the Court, a Judgment which shall declare and adjudge that the plot of ground mentioned in the Declaration is the property of the Plaintiffs for 1|5th each, (the last 1|5th being the property of the minor Pierre Gourdin,) with costs against the Defendant.

The demand is made on the allegation, by the Plaintiffs, of the existence of a "contre-lettre" given by the Defendant to the late Joseph Gourdin, acknowledging the fact that the said plot of ground, of which the Defendant was the apparent owner, was verily and truly the property of the late Joseph Gourdin, with a promise that the same should be transferred in his, the late Joseph Gourdin's name, whenever the latter should require it being done.

It is further alleged that the Defendant having got improper possession of the "contre lettre" so given by him as aforesaid, which was in the custody of the widow of the late Joseph Gourdin, now refuses to give back the same and to transfer to the Plaintiffs their share and portion of the ownership and property of the said plot of ground apparently vested in him, the Defendant.

Hon. L. Arnaud, for the Plaintiffs, examined the Defendant for the purpose of deriving from his answers a beginning of proof, so as to let in oral Evidence to prove the existence of the "contre-lettre" and the fact charged (*viz:*) of the undue taking possession by the Defendant *of the alleged* "contre-lettre."

After the personal examination of the Defendant, Mr. Arnaud put into the box a witness to prove the existence of a "contre-lettre."

This oral evidence was objected to by Mr. J. Colin who rested his objection on Art. 1341 and 1348 C. C.

Mr. Arnaud's answer to this objection was that the refusal of Defendant to produce the "contre-lettre" which he had been summoned to bring with him into Court rendered secondary proof of the existence of the "contre-lettre" admissible. There being no duplicate of that Instrument, parol Evidence was the onlyproof which can be resorted to, especially in presence of the statements of Defendant on his examination, rendering the existence of a "contre-lettre" so highly probable.

JUDGMENT.

Mr. Justice Bestel: Two allegations are made in the Declaration: 1o. The existence of a "contre lettre"; 2o. The unlawful removal by the Defendant of the same from the custody of the widow Joseph Gourdin.

It is evident that proof of the undue taking possession, by the Defendant, of the alleged "contre-lettre" cannot be gone into before the existence of such "contre-lettre" shall have been first established.

Parol Evidence is not to be allowed to that end (Art. 1341 C. C.) without the existence of a "commencement de preuve par écrit." (Art. 1347, C. C.)

Do the personal answers of the Defendant lead to the inference of the probable existence of the alleged "contre-lettre"? From first to last, the Defendant has adhered to his statement that he was and still is the only true and lawful owner of the plot of ground.—2o. His parents having resided on the ground with all their family, the continuance of the widow and children, since the father's death up to this day, without payment of rent, is a fact which taken alone or in connection with his assertion of being the owner of the land in question, does not necessarily imply that the father was owner of the land. This fact may be the result of feelings of the highest order, (*viz:*) of reverence to his aged parents, and of brotherly love to his brothers and sisters. If so, the presumption must be in favor of the truth of his assertion that the property is and has always been his and not his father's, as alleged.

The facts elucidated by the Defendant's examination, therefore, far from rendering probable (Art. 1347 C. C.) the existence of the alleged "contre-lettre" most strongly militate against it, as well as against the making away with an Instrument, the existence of which is anything but probable.

Whether we refer to article 1341 or 1347 C. C., we find ourselves, for the reasons above set forth, under, the necessity of refusing the oral Evidence tendered, with costs.

SUPREME COURT.

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Concordat conventionnel,—Billet a ordre, Prête-nom,—Serment supplétoire.

—

Arrangement by deed,—Promissory note,—Prête-nom,—Supplementary Oath.

—

EMILE SERRET,— Plaintiff.

versus

WIDOW BARNARD AND ORS.,—Defendants.

—

Before:

The Honorable MR. JUSTICE BESTEL, *and*

The Honorable MR. JUSTICE COLIN.

—

COLIN, —Of Counsel for Plaintiff.
V. DELAINÉ, —Plaintiff's Attorney.
W. NEWTON, —Of Counsel for Defendants.
W. HEWETSON,—Defendants' Attorney.

—

13*th June* 1866.

MR. JUSTICE COLIN:—This was an action brought by the Plaintiff against the Widow and Heirs of the late Joseph Barnard, and Joseph Barnard the son, personally, the latter sued as endorser of the note sued upon, to recover the sum of $1000, the value of a promissory note.

The Plaintiff had not consented to become a party to the private agreement between the late J. Barnard and his creditors; and as this Arrangement was not made under the control of the Court neither had it in any way been confirmed by the Court, it could not bind the minority of the creditors who dissented from its proposals.

It was attempted to show that Serret, the Plaintiff, was not the *bonâ fide* owner of this note, but that it belonged in reality to another party who would have been barred from suing thereon. Any reasonable proof of that fact would have necessarily been fatal to the Action. But no such proof was made, and the personal answers of the Plaintiff, although not so satisfactory as they might have been, and although from their nature sufficient to have induced the Court to permit the Defendants to adduce parol Evidence of the facts attempted to be proved, did not make out or confess that the note sued upon was the property of some other person not entitled to sue. The Defendants have not applied to support their position by parol Evidence, and the result must be that Judgment must go in favour of the Plaintiff provided that he do take the supplementary oath to the effect that the note sued upon is *bonâ fide* his property, and was his property on or before the 25th day of February 1864, otherwise a nonsuit to be entered.

Costs to follow the Judgment.

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SUPREME COURT.

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CONCORDAT CONVENTIONNEL. — OBLIGATION DE DONNER DES BILLETS D'UN TIERS EN PAIEMENT DES BILLETS DU DÉBITEUR.—ACTION EN DOMMAGES ET INTÉRÊTS.

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ARRANGEMENT BY DEED.—OBLIGATION TO DELIVER PROMISSORY NOTES OF A THIRD PARTY IN PAYMENT OF THE DEBTORS' PROMISSORY NOTES—ACTION IN DAMAGES.

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F. MOLLIÈRES THE WIFE,—Plaintiff,

versus

WIDOW J. BARNARD AND OTHERS,—Defendants.

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Before:

The Honorable Mr. JUSTICE BESTEL, and

The Honorable MR. JUSTICE COLIN.

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J. L. COLIN; —Of Counsel for Plaintiff,
V. DELAINÉ; —Plaintiff's Attorney,
W. NEWTON; —Of Counsel for Defendants,
W. HEWETSON;—Defendants' Attorney.

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[13*th June*, 1866.]

This was an action brought by the Plaintiff, to recover from the Defendants, widow and heirs of the late Joseph Barnard, five promissory notes made by one Martin Moncamp and endorsed by H. Lemière, which the late Joseph Barnard had promised to hand over to the Plaintiff, on receiving back his own promissory notes endorsed by Joseph Barnard Junior, or in case such notes could not be delivered to the Plaintiff, the amount thereof, to wit: five thousand dollars.

The Defendants pleaded that by a certain agreement passed between the Plaintiff, among others, and the late J. Barnard, the Plaintiff had undertaken not to take judicial proceedings against the late J. Barnard.

J. L. COLIN, for Plaintiff and W. NEWTON, for Defendant, were respectively heard.

JUDGMENT.

Mr. JUSTICE COLIN: The case is similar to one tried, on the same day, between the same parties, before this Court, and in which the Court held that the Plaintiff was estopped by her agreement from suing the Defendant.

It appears from two documents dated, the first: 25th of February 1864 and the second, the tenth January 1865, that the creditors of the late Mr. Barnard consented to allow him time to work his Sugar Estate "*Astræa*," in order to pay off the liabilities he had incurred. The Plaintiff is a party to the agreement, which she signed.

This agreement was made out of Court, and has not been confirmed by the Court, but although, on that account, not binding upon the creditors who have not consented to it, it must, like all other contracts of this nature, be supported, and receive all its legitimate importance. The Plaintiff is therefore stopped from carrying on proceedings against the Defendants. There is no difference between this cause, and that already tried by the Court. The late Mr. Barnard was to give promissory notes of one Martin Moncamp, in payment of his own, but in default thereof he would necessarily be bound to pay his own, and if not for the estoppel drawn from the agreement above alluded to Judgment would have gone against the Defendants for the amount claimed; and this is precisely what the Declaration aims at. The difference attempted to be shown from the supposed fact that this should be construed as a question of damages is not tenable; it is a debt, and nothing but a debt; the Declaration never alludes to damages at all, and very properly so; the Court would not have allowed that to be done, by a side wind, which may not fairly and legally be done directly.

Judgment must go for the Defendants with costs.

COURT OF ASSIZES.

INFANTICIDE, — ALIENATION MENTALE, — TÉMOINS,—DÀTENTION PROVISOIRE DE L'ACCUSÉE.

INFANTICIDE,— INSANITY,— PROFESSIONAL AND ORDINARY WITNESSES,—PROVISIONAL DETENTION OF THE PRISONER.

THE QUEEN

Versus

POINEE.

Before His Honor the CHIEF JUDGE.

THE HON. W. G. DICKSON, *Procureur and Advocate General*,—for the CROWN.
H. LIONNET,—Of Counsel for the Prisoner.

15th June, 1866.

The prisoner was accused of the murder of her infant child. Her Counsel submitted a Plea of insanity in bar of proceeding to trial. Various witnesses were examined. The leading points in their evidence is noticed in the charge of the Judge.

Counsel addressed the Court and Jury.

THE COURT: Gentlemen of the Jury, in the present enquiry you have a duty to perform of a delicate nature and certainly not without difficulty. You have to consider questions directly and most closely affecting that mysterious thing, called the human mind, and you will have to decide, looking at the evidence which has been laid before you, whether the prisoner is now in a fit state to be sent to trial, or whether she is so far bereft of ordinary reason, that she ought not to be made to undergo, at present, the ordeal of an investigation before a Court of Criminal Inquiry.

In the outset, one thing seems quite clear. The prisoner, we are told by all the witnesses, is in the same state at present as she has been for some months past We may therefore accept as applicable to her present situation what the witnesses have observed in her appearance, demeanor, and conduct generally, for the last 5 or 6 months. Now, I have farther to state to you that the law presumes and necessarily presumes, that when a person is charged with a crime, he has that ordinary average amount of intellect and intelligence which makes him responsible for his actions to the laws of his country. This presumption the prisoner must displace through his Counsel before he can escape the necessity of standing his trial, when an Information is preferred against him by the CROWN. In other words before you can find that the prisoner is not a fit subject for immediate trial, you must be satisfied that she has established her mental deficiency by undoubted evidence. To what extent that deficiency must be proved to exempt her from being, at once, put on her trial, we shall see by and by.

You will observe, Gentlemen, that the witnesses examined in Court have been of two classes, professional medical gentlemen, and ordinary witnesses who knew the prisoner, but who do not profess to have made cases of mental disease or aberration their particular study, more than you or I have done. Now I must warn you that you are not entitled to look at the evidence of the medical men as that of *Experts*, in that sense that their testimony is to be accepted by you as matter of fact, on which alone you are to decide the issue you are trying. We are always happy to have the assistance of professional men in Courts of Justice, but this is not a case where their opinion is to be taken as conclusive. In some instances we rely upon their opinions as decisive of a particular point in the enquiry. For example we have medical men before us almost daily, I am sorry to say, in cases of homicide. They tell us after careful *autopsies*, or examinations of the dead bodies, what the cause of death was, in each particular instance. When their testimony is clear and unhesitating, we accept it as conclusive, in those enquiries, because the knowledge and skill acquired by them from long study and minute

acquaintance with the organization of the human frame enable them to speak with reliable certainty on points with which ordinary persons however well educated are not familiar.

But in cases of Inquiry into the state of a person's mind, we do not attach the same importance to their opinions. We do not, of course, reject such witnesses, but we take them merely as other witnesses, as persons of education, some of whom may have made cases of insanity their peculiar study and we combine their evidence with that of the other witnesses, judging of the whole proof according to the opportunities of observation which the different witnesses may have had of the party whose mental condition is under investigation, the general intelligence and appearance of each witness in the box, and the other ordinary principles which we apply to oral testimony.

You have had the evidence of the husband of the prisoner, of the matron of the jail where she has been confined, and of three eminent medical gentlemen. (The leading parts of the evidence were here read to the Jury.)

You will remark, gentlemen, that there is considerable difference of opinion among the witnesses, but you will judge of the facts to which they speak and draw your own conclusions. The opinions of the witnesses may, more or less, assist your judgment, but they must not supersede your judgment. You must look at the case, if I may use the expression, with your own eyes, in all the light which may have been shed upon it from any quarter, but you must not look through the eyes or adopt the conclusions of any of the witnesses, unless you, yourselves and for yourselves, concur in those conclusions. One thing is evident: The prisoner is not an idiot, she is not by any means totally deprived of reason. She could do the usual house-work performed by females in her position, and in the Jail she acquired enough of creole in a few weeks to be able to converse with other persons in that language. On the other hand all the witnesses agree in saying that she is "not like other persons." Every one says she is "peculiar," and has been so from the beginning of this year, or for about a period of six months. Her peculiarity consists in a vacant and unmeaning stare of the countenance, suddenly and frequently changing a smile or laugh where there is nothing to laugh at, and the matron of the jail, who is both intelligent and has seen many insane persons, says that her conduct is quite similar to what she had remarked in cases of undoubted insanity. Her appearance attracted the attention of Dr. CURRIE, the Chief Medical Officer of the Colony, the first time he saw her, when she was standing in a crowd of other prisoners. Before he heard any thing about her, he remarked to the by stander, "that woman is of weak mind." At one time the witnesses tell us that she has "an unnatural subserviency" to those around her, the next moment she evinces "a most obstinate resistance" if she his not allowed her own way. If she is only touched in passing by any person, and often, even without any apparent cause at all, she screams out, becomes violent, furious and outrageous, and requires to be put under restraint. She walks up and down the prison yard, with her arms folded and with a defiant air and carriage, making silly observations on the visitors. Such conduct is, as I dare say most of you are aware, quite common in the places of detention of the insane, and the witnesses agree that she is not pretending insanity. She gives no reason for killing her child, except that she did it "*comme ça même, i.e.*: because she did it." Some of the witnesses are of opinion that she is quite aware of what she is accused of, and why she is here to-day, and that she can instruct her Counsel for her defense, like any ordinary similar prisoner. Others are of a totally different opinion on all those points. I recommend you, gentlemen, to look carefully at the prisoner, as she stands before you, and draw the conclusions which you think her appearance and demeanor may warrant. I have done so, and I must say that my impression is that this woman is not, at present, a fit subject for trial. But, you know, my opinion in such a matter is not binding on you, for the Decision of the question is entirely within your department and your competency of the circumstances of the death of the child. We know, I may say, absolutely nothing, at this stage of the enquiry, beyond the admitted fact that it was about 3 years old and was killed some weeks ago by the prisoner, its own mother. What the affection of a mother towards her own child is, we all know from the experience of daily life and the testimony of Holy writ itself. How far the little we know of the death of the child can assist you in the present, you will judge, but, certainly, the destruction of her own child by a mother in possession of her reason, is a thing most unlikely to happen.

It is clearly proved that the prisoner is not, on the one hand, like ordinary persons, in regard to mind and intellect, nor on the other, an absolute idiot. All the witnesses agree that she is not like ordinary persons but is very peculiar in her manner. But you must judge of that peculiarity by the facts sworn to, for, a mere slight peculiarity can never render a person unfit for trial. But without being altogether deprived of reason, a person may be in mind as to be totally unfit for trial. If she knew the nature and quality of the act which she committed, your "verdict" will be for the CROWN, it will be the opposite if you find that she did not know what she was doing. You will probably consider the statements of the matron of the prison as very important in the case. DR. CURRIE also, who heard the whole or nearly the whole of the evidence before being put in the box, gave us clear and distinct evidence: "He "thinks the prisoner has only a vague idea of "what is going on and could not inform her "Counsel of anything pertinent to her case."

He is of opinion "that the prisoner's mental "deficiency is morbid, arising from insanity ap"proaching to idiotcy. Such imbecility as would "render the person unfit for trial."

The Jury retired and after consultation returned a "verdict" that "the prisoner is insane and unfit for trial."

The Court ordered the prisoner to be detained provisionally in strict custody in such place of

detention as His Excellency the Governor might order, with the view of having the proper means employed for the recovery of her mind.

COURT OF ASSIZES.

MEURTRE,—JURY,—PEINE DE MORT,—ERREUR IMPUTÉE AU CHEF JURÉ,—AFFIDAVITS,—NEW TRIAL.

La Cour ne prendra point connaissances d'"Affidavits" de Jurés ayant pour but d'établir que le "Verdict" du Jury est le résultat de l'inconduite de certains jurés dans la Chambre des délibérations.

Mais elle admettra les "Affidavits" qui tendront à prouver que le Chef Juré a commis une erreur en prononçant le "Verdict" en Cour.

MURDER,—JURY,—SENTENCE OF DEATH,—ALLEGED ERROR OF THE FOREMAN,—AFFIDAVITS,—NEW TRIAL.

Affidavits of Jurymen will not be admitted in support of allegations that the Verdict returned in open Court was the result of misconduct on the part of the Jurymen themselves in the jury-room.

But affidavits will be received as to what took place in open Court when it is alleged that the Foreman committed an error in reporting the Verdict to the Court.

THE QUEEN

Versus

NARSAYE.

Before: THE FULL BENCH.

W. NEWTON, A. LEGALL, } Of Counsel for the Prisoner.

17*th July* 1866.

In a trial for murder, a verdict of "guilty" by a majority of 7 to 2 was returned by the foreman of the Jury, in open Court, as usual, and sentence of death was pronounced.

Some days thereafter certain affidavits were made by some of the Jurors tending to shew that the foreman had committed a mistake in including the name of one of them in the majority.

Under a Rule to shew cause why the wole proceedings should not be set aside and a new-trial granted, the Court held that the fact of whether the foreman had or had not committed a mistake in returning the verdict in open Court, might be inquired into by the affidavits of the members of the Jury, and being satisfied on their affidavits that the foreman had not committed a mistake, the Rule was refused.

The following authorities were quoted and relied on in this case: GREENLEAF, on *Evidence* (American) §252.—PHILLIPPS, on *Evidence* V. 1 Page 182.—DICKSON, *Law of Evidence.* (Scotch) V. 2. § 1839 &c.—TAYLOR, on *Evidence* § 864. (Edn. 1858).—BEST, on *Evidence.* Page 689.—*Shaker* v *Graham* 4. *Meas and Wels.* 721. *Burquese* v *Langley* 5. M. and Gr. 722. *Vasie* v *Delavel*, Term Reports. v. I. p. 11 and BARNE's Notes.—BEST, on *Evidence.* Page 688. and TAYLOR on *Evidence.* § 863.—*Cogan* v *Ebden.* 1. Burrows 383.—*Evrett* v *Jouelly.* B. and Adolph. IV. 681.

The Judgment of the three Judges which explains the nature of the case was as follows:—

THE COURT.

The motion which has been made in this case touches matters of high and grave importance in the administration of Justice by Jury-trial. We are called upon to set aside the whole proceedings in a trial for murder, where every legal solemnity was duly observed from its commencement to its close, and where after a long and patient investigation, a verdict of "guilty" by a majority of 7 to 2 was returned by the foreman, was duly recorded in open Court and was necessarily followed by a sentence of Death.

We are now asked to annul all that has been done and to grant a new-trial on certain affidavits made 4 or 5 days after the trial, by three of the Jury, of whom one has stated that his vote was erroneously classed with the majority by the foreman, the result of which would necessarily be, that the Jury stood, in point of fact, 6 to 3, in other words that no legal verdict was arrived at, as by our local Law a majority of 7 to 2 is required to make a verdict. The affidavits of the other two Jurymen have only a comparatively slight bearing on the question of whether the alleged mistake did or did not take place.

On these affidavits being submitted to the learned Judge who tried the case, a reprieve was granted till the matter should be heard before the whole Court. The motion having been opened before us by the Counsel for the prisoner, was resisted by the Public Prosecutor as altogether incompetent and inadmissible. He contended, with great force of reasoning, supported by reference to numerous authorities in the Law of England, the system which must guide us in such an enquiry as the present, that on grounds *of public Policy*, the verdict of a Jury *cannot be allowed to be impeached by affidavits of individual Jurymen* as to what took place within the sacred precints of their Chamber of deliberation. He therefore maintained that the Court could not even look at the affidavits and that the motion must *de plano* be refused.

It appears to us that there was a distinction to be made, at this point of the discussion.

We were of opinion that we ought to look at the affidavits, for the purpose of ascertaining clearly what the allegations really amounted to, in other words, that the Court might be seized, to use a familiar expression, with the motion and

its grounds as actually pressed upon our attention, but that such an inspection of the affidavits must be under the strictest reserve of the question whether the affidavits of Jurymen, as to what took place in the Jury-room, *could be admitted as evidence* to any extent whatever.

We entirely concur with the Judges in England, who have repeatedly ruled on grounds of public Policy, that *affidavits of Jurymen are not to be admitted, in support of allegations that the verdict returned in open Court was the result of misconduct on the part of the Jurymen themselves, in the Jury-room.* To permit a proof of real or merely alleged misbehaviour, by the affidavits of the Jurymen themselves, would open so wide a door to fraud and malpractices, after the trial, that it might almost be said, if such inquiries were to be tolerated, that no verdict would be safe. But we think that affidavits of Jurymen may be received as to what took place in *open Court*, when it is alleged that the foreman committed a blunder in *reporting* the verdict to the Court. To this extent, viz : the rectification of an alleged blunder or error by the foreman, we think both in principle and on authority *that such affidavits are admissible in evidence.*

It may be said that the Jurymen are all present in Court when the verdict is given in and have the best of all opportunities of correcting it, if it is erroneous ; but it must not be forgotten that as unanimity is not required here as in England, individual Jurymen, when the verdict is given by a majority have less certainty that their opinions have been correctly recorded, and their silence when the verdict is stated and recorded in Court, is not so conclusive that the verdict reported is the true one, as it is in England.

We accordingly perused the affidavits and having done so we made an order allowing the Crown to put in the affidavits of the other members of the Jury, limited to the question whether the foreman did or did not make a mistake in returning the verdict as standing :

" Guilty " by 7 to 2.

These affidavits have now been submitted to the Court, along with the affidavits originally put in for the prisoner, and Counsel have been fully heard on both sides.

We have very carefully considered the whole matter and we have arrived at the conclusion that the prisoner has failed in proving that there was a mistake on the part of the foreman in giving in the verdict of Guilty by a majority of 7 to 2 ; we are satisfied that the verdict, as recorded at the trial, was the true verdict in the case.

The Rule is therefore discharged. *

*In compliance with this Judgment the 24th July was appointed for the execution of the Sentence of death passed on the Prisoner ; when on the 23rd a Petition signed by a certain number of the members of the Bar and of the public was presented to His Excellency the Governor against the carrying out of the Sentence which was accordingly commuted into 20 years hard labour.

COURT OF ASSIZES.

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HOMICIDE INVOLONTAIRE,—C. P. ART. 239.

Quels faits sont nécessaires pour rendre le cavalier responsable de la mort occasionnée par son cheval.

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INVOLUNTARY HOMICIDE, P. C. ART. 239.

What facts are necessary to make one responsible for the death caused by his horse.

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THE QUEEN

Versus

H. W. TURNER.

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Before His Honor the CHIEF JUDGE.

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H. LIONNET,—Of Counsel for the Prisoner.

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13*th March*, 1866.

In this case, the Information, under Art. 239 of the PENAL CODE, set forth that the prisoner being mounted upon a certain horse which he was then riding upon and along a certain high road, leading from Pamplemousses to Flacq, did, then and there, ride the said horse along the said road at a furious rate of speed, and did so unskilfully, negligently and imprudently ride and manage the said horse that it did strike, overthrow, injure and kill one Jeanne Bonne, then and there walking along the said road, and the prisoner did by unskilfulness, imprudence and want of caution and negligence, involuntarily commit homicide, against the peace of our Lady the Queen, &c.

The evidence shewed that the deceased, who was a frail and deaf old woman, upwards of seventy years of age, was walking along the side of a public road, about 18 feet broad, with a small ditch at each side, when the prisoner, one of the mounted Police of the Colony, came up riding at a great pace and suddenly turning his horse round at the spot where she was, the animal threw out one of its hind legs and struck the woman a fatal blow on the head.

It was also shewn that the horse was of a vicious temper and difficult to manage, that he had previously thrown several persons and among others the prisoner.

THE COURT :—Gentlemen of the Jury, this is, plainly, not a serious case against the prisoner whatever view you may take of it. You must be satisfied that the death of this poor old wo-

man was caused, either by the unskilfulness, or imprudence, or want of caution, or negligence of the prisoner. It is not necessary, under our law, that all those elements of responsibility should exist in any case, it is enough if you find any one of them proved. You will have to say whether any one of these things has been established as a fact in the case. You must not exact the highest skill in horsemanship from the prisoner, or any other person who uses a horse, it is enough if you are satisfied that he possessed the common average skill of every day life.

It has been said that the horse being of a bad temper, the prisoner should have ridden him the more prudently and cautiously; this may be so far true, but on the other hand you will judge whether the fact of the horse being a vicious animal is not in favour of the prisoner, as he was obliged to ride that particular horse and had no choice of his own. May you not think that, on truth, the horse being put by the prisoner to his speed as he believed he had caught certain parties in a contravention of the law of the high-way, became unmanageable and could not be pulled up in time, before reaching the deceased. Besides as you are aware, and the witnesses have stated that, a horse suddenly wheeled round by his rider, very often throws out one of his hind heels, and though the life of an old frail person must be protected as well as that of other persons, it certainly is a circumstance in favor of the accused here, that the deceased from the frailties of age, was not able to get out of the way, as most probably, a younger person would have done.

The Jury retired, and in a few minutes returned a verdict of " not guilty."

COURT OF ASSIZES.

HOMICIDE INVOLONTAIRE—COUPS ET BLESSURES AYANT OCCASIONNÉ LA MORT SANS INTENTION DE LA DONNER.—PUGILAT—C. P. ART. 228.

INVOLUNTARY HOMICIDE—WOUNDS AND BLOWS CAUSING DEATH WITHOUT INTENTION TO KILL—FIGHTING IN THE STREETS—LAW OF SUCH CASES—ART. 228 OF THE P. C.

THE QUEEN

Versus

JAMES WHITE.

Before His Honor the CHIEF JUDGE.

W. NEWTON,—Of Counsel for prisoner.

29th May, 1866.

The prisoner was charged, under Article 228 of the Penal Code, " with having criminally and " wilfully inflicted certain blows and wounds in " and upon the body of one John Corby, without " intention to kill the said John Corby, but " which, nevertheless, occasioned the death of " the said John Corby, against the peace of our " Lady the Queen, &c."

The prisoner pleaded " not guilty."

From the evidence, it appeared that the prisoner and the deceased had on the day in question, and being both in liquor, repeatedly fought with their fists, in different separate encounters, and that the fight was so far a fair one that they used nothing but their fists. On the last occasion the prisoner after fighting a considerable time stated aloud his wish to desist, and put his hands in his pockets, but the deceased attacked him afresh and after some time spent in wrestling and exchanging blows, the prisoner caught the deceased and threw him violently on the ground, whereby his skull was fractured and he died, in a few hours of the injuries done to his head. The deceased was a bigger and stouter man than the prisoner.

The Counsel for the prisoner maintained two points, *first*: That he had only acted in self-defence, and *second*: That he was not responsible for the death of the deceased, being a consequence altogether unexpected of his fall on the ground.

CHAUVEAU ET HÉLIE, v. 4, p. 10.

THE COURT.

All fighting with the fists, like what occurred in this case, is unlawful, even if intended only as trial of strength, for it is a deliberated breach of the public peace and such encounters almost necessarily lead to the excitement of the violent passions of the combatents. To the earlier stages of those encounters of which we have heard in this case, there can be no room for the plea of self-defence, for both parties appear to have been equally eager for the fray and happily no serious result ensued. Latterly, however, there is more doubt on this point and you, gentlemen of the Jury, will have to consider, whether when the prisoner wished to desist, proclaimed his desire of doing so, and put his hands in his pockets, the fight was not really terminated and the subsequent attack made by the deceased was necessarily and therefore lawfully repelled by the prisoner using force against force. When a person is attacked by another he is entitled to defend himself with due moderation so that he does not go too far and in his turn become the agressor.

But if you shall be of opinion that you can separate the last and fatal fight from those which preceded it, and can find that it was a separate combat in which the prisoner was obliged to defend himself when attacked by the deceased, you will probably think it only fair to make considerable allowance for the agitation in which he was put, if he used more violence than might have been required to drive off his assailant.

As to the second point, I must lay down to

you, in law, that a person throwing another on the ground with violence is responsible for all the consequences which may naturally arise from such violence, as for example, from the head of the person coming forcibly in contact with the hard ground, and being thereby seriously injured. But, a person in such circumstances might not be answerable for the injury inflicted by the accidental and unknown presence, at the place, of any sharp, pointed instrument which might penetrate the skull, and be the cause of death.

In the passage of the French authority quoted at the bar, we find the following Decision of the *Cour de Cassation* which appears to me to be a very sound one and is entirely in accordance with the explanations then given to you. " Il importe peu, pour l'applica- " tion de l'Article 309 et suivants, qu'un corps " dûr soit poussé contre une personne ou que la " personne soit poussée contre le corps dûr ; le " caractère et les résultats de la violence sont " les mêmes. Ainsi le fait de saisir un individu " au corps, et de le jeter avec force, doit être " considéré comme un coup dans le sens des " Articles 309 et 311. Cass. 22 Août 1838. "

Gilbert, Code Penal. Article 309 No. 3.

The Jury retired and in a few minutes returned with a verdict of " not Guilty."

BAIL COURT.

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Séquestre,—Employé,—Arriérés de Salaires, —Clôture du compte de séquestre.

Toute demande en paiement de salaires, par un employé au gardien séquestre d'une propriété, ne doit être faite à ce dernier que tant qu'il agit en cette qualité et non après. Même s'il restait entre ses mains, après la cloture du séquestre, des fonds provenant de son administration, toute demande en paiement de salaires doit alors être faite aux propriétaires du bien ou à leurs ayant droits.

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Sequestration,—" Employé, " — Arrears of salary,—Closing of the account of Sequestration.

Any demand in payment for arrears of salary, by an " employé " to a sequestrator, must be lodged with that sequestrator whilst he is still acting in that capacity. But he cannot be sued on account of some fund still being in his hands and belonging to the Estate, if the sequestration has come to an end before the demand was made. The "employé " must apply to other parties connected with the Estate.

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BOULLÉ,—Plaintiff,

Versus

HON. J. A. ARBUTHNOT,—Defendant.

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Before :

His Honor the Chief Judge.

L. Rouillard, —Of Counsel for Plaintiff.
V. Boullé, — Plaintiff's Attorney.
E. Leclézio, Jun.,—Of Counsel for Defendant.
W. Hewetson, —Defendant's Attorney.

—

9th May, 1866.

This was a claim by an "Employé" upon a sugar Estate, against a sequestrator, for certain arrears of salary.

The Court pronounced a verbal Judgment in May last, refusing the demand. The following were the principal grounds of the Jugdment :—

That the Plaintiff, though aware of the time when the sequestration was to be finally closed, did not send in any note of what was due to him ; that the amount might be settled with the other claims ; that in point of principle, the Plaintiff could not maintain that the sequestrator had incurred any personal liability to him.

That the sequestration having come to an end before the demand was made, the sequestrator was *functus officio*. He was only liable to pay the charges of the Estate, while he remained the Judicial Officer of the Court, and he had ceased to be so before he was sued.

That the fact of his having still some funds in his hands, belonging to the Estate, made no difference, as those funds arose after he had ceased to be the sequestrator, from mere accident, *viz* : certain sugars having produced a somewhat larger price than they had been valued at, when he closed his accounts.

That the remedy open to the Plaintiff did not, in the circumstances, lie against the sequestrator, but against the other parties connected with the Estate.

SUPREME COURT.

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Contrainte par corps — Jugement — Procédure.—Délai.

Lorsque la contrainte par corps sera demandée contre le Défendeur plusieurs mois après que le Jugement de la Cour aura été rendu contre lui sans qu'il ait été donné de raisons suffisantes pour expliquer un pareil délai, cette demande sera refusée.

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Procedure—Judgment—Caption of the body. —Delay unexplained.

Where no motion was made for incarceration of the Defendant when Judgment was pronounced against him, the Court refused to make that addition to the Order, at the distance of some months after the date of the Judyment, and no explanation of the omission to ask caption at the proper time being given.

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LEFÈBURE, Plaintiff,

versus

BRODIE, Defendant.

—

Before:

His Honor the CHIEF-JUDGE and
The Honorable Mr. JUSTICE BESTEL.

—

r. NEWTON,—Of Counsel for Plaintiff,
. MALLET, —Plaintiff's Attorney,
COLIN, —Of Counsel for Defendant,
r. FINNISS,—Defendant's Attorney.

—

17*th August*, 1866.

THE COURT.—In this case the original demand is for the sum of $914.97 being the alleged lance on an account current between the par-es. In the plaint it was stated that the tran-ctions were commercial and interest at the te of 12 per cent and arrest in execution were ncluded for.

On the 27th April last, the Court pronounced idgment in favor of the Plaintiff, but only for e amount of $227.54 with $9.43 of interest, rest in execution was not asked when Judg-ent was pronounced.

The Court has now been moved after the lapse several months to allow the caption of the dy as against one of the Defendants, the Se-or Member of the firm H. J. Brodie. The Mo-n has been opposed, and the Defendant has ied on the Judgment of this Court in the case *Ayoob* v *Ayavoo*, 4th July 1864, (PISTON's re-rts V. IV Page 70.)

It appears to us that the principles enunciat-by the Court in the former case are sound and generally applicable to all cases of this des-ption. We did not then and do not now de-e, that applications like the present one are ogether incompetent. Cases may occur when reditor may be allowed to ask for execution inst his debtor's body, some time after he has en Judgment against him, without demand-that mode of execution; but the Court will tainly not encourage such demands, and will uire a satisfactory explanation of the reason y the Motion was not made at the proper and opriate stage of the proceedings.

n the present case no explanation whatever been given by the Plaintiff of the reasons y he did not ask caption of the body at the per time, viz: when the case was before the urt for Judgment, at the distance of 3 or 4 nths; and in such a position of matters, we no reason for now making an addition to our lgment, carrying with it consequences so se-us.

Motion refused.

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SUPREME COURT.

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CESSION DE BIENS,—ADMINISTRATION DU SYNDIC OFFICIEL, — SAISIE DES IMMEUBLES PAR UN CRÉANCIER AYANT OBTENU JUGEMENT,—EXPROPRIATION FORCÉE,—COMMANDEMENT,—FRAIS, —ORDS. No. 23 DE 1856, 33 DE 1853 ET 14 DE 1864.

Le créancier qui a pris Jugement, et signifié un Commandement en vertu du dit Jugement ne peut faire vendre par expropriation forcée les immeubles de son debiteur si dans l'intervalle du commandement à la saisie le débiteur a presenté une requête en Cession de Biens et le Syndic Officiel des Faillites a été envoyé en possession de ses biens. C'est alors au Syndic a faire procéder sommairement à la vente des Immeubles, tous les droits du créancier sur le prix de ces immeubles étant réservés, y compris les frais faits par lui jusqu'au jour de l'envoi en possession du Syndic Officiel.

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OFFICIAL ASSIGNEE,—MANAGEMENT OF INSOLVENT ESTATES,—INSOLVENCY,—DEBTOR AND CREDITOR,—COSTS,—ORDS. No. 23 OF 1856, 33 OF 1853 AND 14 OF 1864.

Where an application for Cessio Bonorum was presented and filed, and the usual Order was made putting the Official Assignee in possession, after the preliminary steps for seizure of an Immoveable Estate belonging to the Insolvent had been taken by an individual creditor, but before actual seizure by the creditor, the Court ordered the proceedings of the creditor to be stayed, and the Estate to be sold by the Assignees, all rights of parties in the price being reserved, and the creditor being allowed his costs up to the date of the Order putting the Assignee in possession.

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CAMPBELL, OFFICIAL ASSIGNEE IN THE CESSIO BONORUM OF THE HEIRS LANOUGARÈDE,
Plaintiff

Versus

BREMON, Defendant.

—

Before.

His Honor the CHIEF JUDGE, and
The Honorable Mr. JUSTICE COLIN.

—

Hon. H. KŒNIG, } Of Counsel for Plaintiff.
A. LEGALL, }
E. DIVIVIER, —Plaintiff's Attorney.
Hon. L. ARNAUD,—Of Counsel for Defendant.
J. G. TESSIER,—Defendant's Attorney.

—

6*th June* 1866.

The question with which we have to deal

the present case is one of considerable importance in the administration of our Insolvency laws. We have to decide whether, in the circumstances occurring here, the particular creditor, Mr. Brémon, is to be allowed to follow up the procedure which he has begun, for the sale of certain immoveable subjects, the property of his debtors, who are the heirs of the late Mr. Victor Lanougarède, or whether the sale of those subjects must be carried out by the Assignees in the consolidated cases of *Cessio Bonorum* of those Heirs. (*Vide supra*, Page 1.)

It may be remarked, in the outset, that the ultimate right of Mr Brémon will not be affected by the mode in which the subjects may be disposed of; whether the proceedings be stayed or the sale of the subjects be ordered to be followed up by the Assignees, the result, so far as concerns the creditor's interest, will be the same. That is to say the right of Mr Brémon in the sale price, whatever it may be, will remain intact and unimpaired. His position as to collocation on the sale price will be ascertained in the proceedings of the "Ordre" before the Master.

It is very material to notice the dates of the different steps of procedure, for in every Country where a system of Bankruptcy and Insolvency law prevails, there is necessarily a *punctum temporis*, a certain fixed period of time, when an individual creditor must give way before the title of the Assignees in Bankruptcy or Insolvency, acting for the interest of the whole mass of the Creditors and among others, for the particular creditor himself.

Now what is that point of time under our local laws? We must draw the line between the process open to the individual creditor, and the more general process which the Assignees are entitled and bound to follow up, for the inarrest of all concerned. In other words, looking tet he *data* and the texts of our laws, we must ascertain whether the private creditor is entitled agoto on and sell the properties which he was in the course of attaching, or whether his proceedtngs must be stayed and the Assignees authorized to sell the subjects, the price remaining equally open to the claims of the creditor as if he himself had sold them.

Now, as to dates, we find that the foundation of Mr Brémon's title is a promissory note made by the late Mr Lanougarède on the 22nd April 1864. The writ of summons to pay this note, issued on 21st November last and was served the same day. The Judgment of the Court was given on the 4th December for recovery of the amount, interest and costs.

It was served on the 6th December and on this a Judicial mortgage followed, The notice previous to levy (Commandement) was dated and served on the same day.

On the 12th December the heirs Lanougarède presented their application for *Cessio*. It was filed on the same date and the Official Assignee was ordered by the Court, in the usual terms, to take possession of their whole Estates and effects. On the 21st December, Brémon granted a power of Attorney to an Usher, authorizing him to seize the property. The seizure was affected on the 21st of the same month and the Notice of Denunciation was made to the debtors on the following day, viz: the 22nd December. So much for the dates.

The next matter we have to consider is the legal position of the Official Assignee in cases of Insolvency. What are the powers, duties and attributions of that public officer, by our local laws.

In the first place, it is not unworthy of notice, that the Official Assignee, under the Bankruptcy Ordinance of 1853, is also Official Assignee in cases of Insolvency under the Ordinance of 1856. By § 15, 16, and 17 of that law it is farther declared as follows:

"XV.—Forthwith upon the filing of any petition for a *Cessio Bonorum*, one of such Official Assignees shall be appointed, by order of a Judge at Chambers, an Assignee of the petitioner's Estate and effects, to act with the Assignees to be chosen by the creditors, and all the personal Estate and effects, real and personal of the petitioner, shall, in every case, be possessed and received by such Official Assignee alone, save when it shall be otherwise ordered by the Court.

"XVI.—The several Official Assignees shall be the accountants in Insolvency and shall superintend and control the care and management of the funds belonging to Insolvent Estates and of all funds with the arrangement of which they may be charged, and shall conduct the business thereof in such manner as may, by the Supreme Court, be directed.

"XVII.—Until Assignees shall be chosen by the creditors of the petitioner, the Official Assignee shall, to all intents and purposes whatsoever, be deemed to be the sole Assignee of the petitioner's Estate and effects, and if the Court shall so order, may, before Assignees shall be chosen by the creditors, sell or otherwise dispose of any property of the petitioner which shall be of a perishable nature or the holding possession whereof, until the choice of Assignees, would in the judgment of the Court be prejudicial to the Insolvent's Estate. Provided always that anything herein contained shall extend to authorize any Official Assignee to interfere with the Assignees chosen by the creditors in the appointment or removal of a Solicitor or Attorney or after such choice in directing the time and manner of affecting any sale of a petitioner's Estate or effects."

At a subsequent stage the two trade Assignees are chosen. This has now been done in the present case. They are declared (§ 33) to be under the control of the Court and shall, in all things, represent the mass of the creditors, and shall act for them and on their behalf in the sam manner as they themselves could have done, in all acts, actions, suits or proceedings touching or in any way concerning the said *Cessio Bonorum* and the obtaining possession of, management and sale, in the manner and form by law prescribed, of all the real and personal Estates as-

signed and made over by the Insolvent. And, in terms of the next section, the Assignees shall hold exercise and possess all the rights, titles and interest of the Insolvent in all that regards his whole Estate, and may sell, assign or otherwise dispose of the same to the best advantage. (§ 37.) The proceeds of all sales and monies are to be handed to the Official Assignee for division among the creditors. It will be further observed that filing a petition for *Cessio Bonorum* has the effect of a judicial mortgage in favor of the mass of the creditors (§ 42.). A "bordereau" of inscription must, immediately on his appointment, be presented by the Official Assignee to the Conservator of Mortgages (§43). And the general mortgage following thereon shall vest with the Assignee for the benefit of the mass of the creditors.

By § 23 of the Bankruptcy and Insolvency Ordinance of 1864 it is ordered: "XXIII.— "Whenever any doubt or difficulty shall arise "touching the carrying into effect of any provi- "sions of the said Ordinance No. 23 of 1856, "the provisions of the said Ordinance No. 33 of "1853 shall be referred to and applied as con- "taining provisions applicable to such matter."

Under this section an article of the Bankruptcy Ord. of 1853 has been referred to, and very fully commented upon, in the present discussion. It is Art. 88 and it runs in these terms:

"Where no action in ejectment of the real "Estates has been brought previously to the ad- "judication of Bankruptcy, the Assignees shall "prosecute, under the authority of the Court, "the sale of the Insolvent's real Estates accord- "ing to the form prescribed for the Judicial sale "of real Estates."

Looking at these different articles it is plain that the filing of the Petition for *Cessio Bonorum* is a point of time, in a process of Insolvency, attended with very important consequences.

We have seen that, at that date, the whole Estate, real and personal, is to be taken possession of by the Official Assignee; that he has, at least, in the meantime, the whole possession, charge and management; that the filing constitutes a general mortgage in favor of the mass of the creditors. We farther find, from § 2 of the Ord. of 1864, that this stage of the proceedings in insolvency is so far assimilated to the adjudication in a case of bankruptcy, for it is said that when a person is adjudicated a Bankrupt or has filed a petition for Cessio Bonorum, the Court shall have power to order a sequestration of his immoveable Estate; so again, by § 7 it is enacted that on the filing of a petition, the Court shall have power to grant a protection to the Insolvent.

But the question for our discussion here is this: Does the nomination of the Official Assignee vest him with the possession of the Estate of the Insolvent to the effect of ousting Mr. Brémon, as it were, of his ordinary right, as a creditor, to seize and sell the property of his debtor in payment of his debt, and of entitling him, the Assignee, to take the matter into his own hands and follow up the necessary procedure for realizing the whole of the Insolvent Estate.

In considering this question we readily admit that there is considerable force in the argument of the Counsel for Brémon, that a creditor is entitled to seize and sell the property of his debtor in satisfaction of his claim, if there is no positive law preventing his doing so. We think the question may be very fairly put on this footing, and on reviewing the sections of the law which we have quoted it may be conceded that most of them have only an indirect bearing on the point now before us.

But § 88 of the Bankruptcy Ordinance of 1853, which we have already seen, the Court is bound to apply in all cases of insolvency, whenever any doubt or difficulty arises, appears to stand in a different position. It is therein enacted that, in all cases, "the Assignee shall pro- "secute, under the Authority of the Court, the "sale of the Insolvent real Estates, according to "the forms prescribed for the judicial sale of "real Estates, where no action in ejectment of "the real Estates has been brought previously "to the adjudication of Bankruptcy." It is very true that this section is borrowed from the English Bankruptcy Act and that we have no action precisely agreeing with the English action of ejectment of real estate. But we cannot, on that account, hold that this clause is to be treated as a mere nullity in our procedure.

It was put there, no doubt, with a propor object, and to serve a legitimate purpose, and we must enforce it as part of our local system *applicando similia similibus*. We know that our Procedure by "expropriation forcée" is, in many respects, the counterparts of the action of ejectment in England.

By means of this procedure a creditor in Mauritius seizes the immoveable property of his debtor and ejects him from the land, which he sells, applying the proceeds for the payment of the debts affecting it. In the present case, we must therefore enquire if the proceedings in "expropriation forcée" had been brought before the filing of the petition in insolvency, the point of time which, as we have seen, is assimilated in our insolvency law to the adjudication of Bankruptcy.

Now we do not find that this was maintained by the Counsel for Brémon. He took his stand upon another ground, viz: that this clause does not apply to the present case at all, but he did not dispute that the *commandement*, or notice prior to levy is a mere demand of payment, a "mise en demeure," and that it is only after this step that the proceedings proper in an "expropriation forcée" commence; that is to say, in the present case, the "expropriation forcée" began after the filing of the petition in the Cessio Bonorum and the putting of the Assignee in possession.

It is true it was contended that the point of time in a process of insolvency which corresponds with the Fiat of Bankruptcy is the granting to the applicant the benefit of *Cessio Bonorum*, which is sometimes long posterior to the the filing of the Petition. But it does not appear to us that this reasoning is sound. Looking at the terms of our local laws which have been

already quoted, we think that clearly this was not the meaning of the Legislator.

In truth, if the possession given to the Official Assignee is not to interfere with the right of separate action and procedure on the part of the individual private creditors in the position of Mr. Brémon, in many cases, it may be asked of what use is the appointment of the Official Assignee. If such creditors are to be allowed to go on, after the Official Assignee is put in possession, just as before, the proceedings in Insolvency, if they do not become altogether nugatory, must be very much weakened, and one of the purposes of insolvency laws, viz: the simplification of procedure, and the saving of delay and expense, must be seriously impaired.

We are therefore of openion that § 88 of the Bankruptcy Ord. of 1853 must mainly guide us in the decision of the present case, and that as the proceedings for the sale were not taken till after the filing of the petition of Insolvency and the putting of the Official Assignee in possession, the process of the private creditor must be stayed. The Assignees will proceed to sell and realize the immoveable properties belonging to the Estate, the prices to be applied according to the legal rights of the creditors respectively.

In conclusion, it is not immaterial to observe that the procedure for realizing the value of the immoveable subjects belonging to an insolvent Estate can be carried on with greater rapidity and more economy by the Assignees than by the private creditor.

As the question is one of procedure, and this is the first time it has been argued in Court, we shall give no costs in the present discussion.

SUPREME COURT.

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CESSION DE BIENS,—ADMINISTRATION DU SYNDIC OFFICIEL,—SAISIE DES IMMEUBLES PAR UN CRÉANCIER AYANT OBTENU JUGEMENT,—EXPROPRIATION FORCÉE,—COMMANDEMENT,—FRAIS,—ORDS. No. 23 DE 1856, 33 DE 1853 ET 14 DE 1864.

Tous les frais faits par un créancier contre son débiteur jusqu'au jour où ce dernier s'est placé sous la protection de la Cour doivent suivre le sort de la créance principale.

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OFFICIAL ASSIGNEE,—MANAGEMENT OF INSOLVENT ESTATES,—INSOLVENCY,—DEBTOR AND CREDITOR,—COSTS,—ORDS. No. 23 OF 1856, 33 OF 1853, AND 14 OF 1864.

All costs made at the request of a creditor until the debtor has placed himself under the protection of the Court will be considered as accessories of the principal claim.

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CAMPBELL, Official Assignee in the Cessio Bonorum of the heirs Lanougarède—Plaintiff

versus

BRÉMON,—Defendant.

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Before:

His Honor the CHIEF JUDGE, and
The Honorable MR. JUSTICE COLIN.

—

HON. H. KŒNIG,— } Of Counsels for Plain-
A. LEGALL,— } tiff,
J PIGNÉGUY— } Plaintiff's Attorney,
E DUVIVIER— }
HON. L. ARNAUD—Of Counsel for Defendant.
J. G. TESSIER,—Defendant's Attorney.

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[*6th June*, 1866.]

In this case, the Court, on the 6th of last month gave Judgment in terms of the second alternative in the prayer of the Appellant Mr. Campbell, the Official Assignee in the consolidated *Cessio Bonorum* of the Heirs Lanougarède, and found that the proceedings for sale of certain Immoveable subjects, at the instance of the private creditor, Mr. Brémon, must be stayed and ordered the Assignees to proceed to dispose of the Estates. As to costs, the Judgment stated that as the question was one of procedure and had been argued for the first time in Court none would be given. (*See suprà, page* 91).

Since the Jugment was pronounced, a Motion has been made in Court, regarding a point of costs not at all before the Court, under the former discussion, *viz:* The costs of the private creditor, Mr. Brémon, up to the date of the proceedings taken by the Official Assignee to have his, Mr. Brémon's proceedings, stayed. The creditor now prays that those costs be awarded to him.

It appears to us that this Motion for costs up to a certain point of time, is based upon proper grounds and ought to be granted. The private creditor was clearly entitled to take legal steps against the Estate of his debtor for the payment of his claim, and till the possession of the property passed, by the filing of the petition of *Cessio Bonorum*, into the hands of the Official Assignee, on the 12th of December last, Mr. Brémon is, we think, fairly and justly entitled to the expenses incurred by him in his *bonâ fide* procedure against the property of his debtor. We shall therefore allow his costs up to that date, but to no greater extent.

It appears that Mr Brémon's debt was $1,000, and that for obtaining payment of this sum he took proceedings against a large number of separate immoveable subjects of his debtor.

If hereafter it should be alleged that the creditor had, in any respect, abused his right of ac-

taching the property of his debtor by unnecessary or excessive multiplication of proceedings, that question would fall to be raised before the Master, at the taxation of the Bill of costs and disposed of in the ordinary way.

BAIL COURT.

APPEL D'UN JUGEMENT DE MAGISTRAT DE DISTRICT,—SOCIÉTÉ COMMERCIALE,—CONTESTATIONS ENTRE ASSOCIÉS, COMPÉTENCE DE LA COUR DE DISTRICT ET POUVOIR DISCRÉTIONNAIRE DU MAGISTRAT EN SEMBLABLES MATIÈRES,—RENVOI DEVANT ARBITRES,—ARTS. 18 ET 51 C. COM.,—ART. 28 ORD. 34 DE 1852.

En matière de société commerciale, et en cas de dissidence entre associés et pour raison de la société, le Magistrat pourra, en usant de son pouvoir discrétionnaire, et du consentement des parties au procès, renvoyer la cause devant arbitres.

APPEAL FROM A DECISION OF DISTRICT MAGISTRATE,—COMMERCIAL PARTNERSHIP,—CONTESTATION BETWEEN PARTNERS,—JURISDICTION OF THE MAGISTRATE AND HIS DISCRETIONARY POWER IN SUCH MATTERS,—REFERENCE TO ARBITRATION,—C. COM. ARTS. 18 AND 51,—ART. 28 OF ORD. 34 OF 1852.

With the consent of both parties to the suit, the District Magistrate may refer to arbitration all matters in dispute between partners and relating to the partnership. But such reference is not binding upon him, even if consented to by both parties to the suit.

SINOO PADIACHY,—Appellant,

Versus

SOOPRAYA CHETTY & anor.,—Respondents.

Before:

The Honorable Mr. JUSTICE BESTEL.

H. WILSON, —Of Counsel for Appellant.
T. HERCHENRODER,—Appellant's Attorney.
W. NEWTON, —Of Counsel for Respondent.
H. BERTIN, —Respondent's Attorney.

23*rd August*, 1866.

The parties to this Appeal were partners, under an act under private signatures of the 6th April 1865, for the purpose of hawking iced lemonade with a license in the name of Mr. Charles Bedel, to which end a small hand-cart had been purchased by the partnership, and a four-wheeled large spring-cart to hawk ice with a license taken out in the name of Soopraya Pillay, one of the partners and Respondent.

It was stipulated ,by the act of partnership, that the commercial association should be for the period of one year, and that at its expiration the stock in trade should be sold to other parties or to one of the partners who should pay what might be due to the other partners.

The now Appellant complained in the Court below that, in his absence, the now Respondent illegally and without his will and consent sold and delivered to one Sokein a cart, a mule and set of harness and other utensils connected with the trade above mentioned, contrary to the above agreement, the same belonging to the aforesaid society,whereby and by reason of which breach of agreement damages have been sustained by the Appellant to the amount of $250,—payment of which he demanded of the Defendant in the Court below.

A Plea to the Jurisdiction of the Magistrate was taken in the Court below, and maintained by Mr. NEWTON, before this Court, citing in support of his Plea Arts. 18 and 51 C. Com.

The action was, as contended by NEWTON, a contestation between partners, " pour raison de la Société," which the District Court could not entertain except for the sole purpose of referring the matter to arbitration, as required by art. 51 of the CODE OF COMMERCE.

The reply was that it was not a contestation between partners, but rested on art. 1850 C. C., which says that : " Chaque associé est tenu envers la société des dommages qu'il lui a causés &c." See also Arts. 1845, 1860, and 1382 C. C.

The Plea to the Jurisdiction, in this Court, met with a similar reply as the one made in the District Court.

JUDGMENT.

On reference to the Art. 28 of the District Ordinance, (Civil Side,) I read that : " The Magistrate may, in any case, *with the consent of both parties to the suit*, order the same, with or without other matters within his Jurisdiction, in dispute between such parties, to be referred to arbitration, &c."

This enactment is the repetition of the powers given to the Judges of the County Courts by the County Court Act. (See Sect. 77, p. 444, COX and LLOYD'S *County Court practise).*

If the consent of both parties to the suit is required by the Ordinance and by the Statute, for a reference by the Magistrate or Judge, it is certain that without such consent neither has power to refer to arbitration matters within his Jurisdiction.

Art. 51 C. C. makes it imperative upon the Supreme Court to refer to arbitration a l matters

in dispute between partners "et pour raison de la Société." The District Court Ordinance and County Court Act, far from placing the Magistrate or Judge under the same obligation, have laid down a contrary rule for their guidance, *viz* : That the Magistrate or Judge shall proceed to Judgment unless *both parties* to the suit should consent to a reference to arbitration ; upon which alone the two laws agree in empowering the Magistrate or Judge to order such reference.

There can therefore be no such a thing as a *forced arbitration* in the District or County Courts ; for even were both parties to the suit to consent to a reference, the Magistrate or Judge would not be bound to order such reference, unless the word *may*, used in both laws, be construed as meaning *shall*,—for which construction I see no necessity.

By allowing the Plea of Jurisdiction, it appears to me that the District Magistrate has departed from the letter of Art. 28 of the District Ordinance.

I am therefore bound to quash the Judgment appealed from.

Judgment is accordingly quashed, with costs, and the matter referred to the Magistrate for Judgment.

SUPREME COURT.

ORDRE,—HYPOTHEQUE LÉGALE,—SÉPARATION DE BIENS,—COLLOCATION EVENTUELLE.

Bien que la femme mariée sous le régime de la communauté n'ait pas encore obtenu Jugement en séparation de biens, elle a droit à une collocation eventuelle à l'Ordre ouvert sur le prix de vente d'un immeuble appartenant à son mari.

"ORDRE,"—LEGAL MORTGAGE,—SEPARATION OF PROPERTY BETWEEN HUSBAND AND WIFE,—EVENTUAL COLLOCATION.

Although the wife married under the system of community of goods has not yet obtained a Judgment of separation of property, she is entitled to an eventual collocation to the "Ordre" opened on the sale price of an immoveable property of her husband.

DUBOIS ST. ALME, the Wife,—Appellant,

Versus

J. & A. LOUMEAU, and Anor.,—Respondents.

Before:

The Honorable MR. JUSTICE BESTEL, and
The Honorable MR. JUSTICE COLIN.

G. GUIBERT,— Of Counsel for Appellant.
J. H. ACKROYD,—Appellant's Attorney.
A. LEGALL, L. ROUILLARD, } Of Counsel for Respondents.
J. BOUCHET, E. DUVIVIER, } Respondents' Attornies.

6th September, 1866.

This was an Appeal from an Order given by the Master, on the 5th day of May last, rejecting the application made by Mme. Dubois St. Alme to be collocated in the scheme of distribution by way of an "Ordre" of the sale price of a house situate in Enniskillen street, Port Louis, and sold on the 17th August 1865, against Hippolyte Dubois St. Alme, when Bruneau Duhan became the purchaser. The Appellant claimed collocation in preference to J. & A. Loumeau and Alfred de Pitray, two of the Respondents.

G. GUIBERT, for the Appellant, urged that the Appellant had brought, according to her contract of marriage, the sum of $4,800, which her husband received; the husband became insolvent, his house was sold, and the wife had before the Master claimed to be collocated provisionally for that sum, as the proceedings by her instituted to obtain a separation as to property had not been brought to a close. The Master refused, because as he said, no collocation could be conditional.

I contend that the reverse is the case, and I cite.

TROPLONG, Art. 2,100.

Also IV Nos. 959, 993.

A. LEGALL AND L. ROUILLARD.—The wife was not authorized by her husband to make a "Contredit," and therefore she is out of Court. On the merits, the property, the price of which is to be shared, is community property, the debt is a community debt, and therefore the creditors should be collocated. Where is our security that Mme St. Alme will follow up the Judgment of separation she may have obtained and repudiate the community ? She has already been negligent, she applied for separation on 15th May 1865, her husband had been insolvent long before, for she had already come before the Court and withdrawn. Being still under Community, she cannot claim. We may add that the "Contredit" is not signed. They referred to Arts. 1414, 1415.

G. GUIBERT, in reply : There has been no negligence ; the time lost has been lost through the intervention of the Official Assignee, whose procedure was bad. When my client produced before the Master, she had brought her action, and her title being eventual she ought to have been secured by an eventual collocation. I have an hypothec, by law, and what I want is not to lose the benefit of my hypothec.

JUDGMENT.

There seems to be no doubt that the Appellant brought to her husband, by marriage settlement, a sum of $4,800, for which sum she has her legal hypothec on her husband's real property This has not been disputed, the only contention raised on the merits, before the Master and before this Court, is whether she, the wife, having not repudiated the Community yet, is entitled to have an eventual collocation, or whether she is to lose altogether the benefit of her hypothec ? We say that is the sole question,

for there is nothing in the point that the house was the property of the Community ; if the wife repudiates the Community, after separation as to property, she has her legal hypothec, unless barred by the operation of some special law, or by some Act of her own, and no such contingency is suggested in this case.

Several technical points were urged on behalf of the Respondents ; the *first* is : That the Appellants acted without authorization. We agree with the Master that there is sufficient evidence of authorization, since the act of production is made by the wife duly authorized; The *second* is : That the "Contredit" is not signed, the point was not taken before the Master, and may not be taken here.

The husband's house has now been sold, and the price thereof is being distributed ; before the wife has actually repudiated, can she say to her husband's other creditors : "I intend to repudiate, and as my hypothec is superior to your's, I am entitled to an eventual collocation which will drop if I do not repudiate, but which, if I do repudiate, when I have obtained my Judgment of separation, will secure my claim." The Master rejected her prayer, because he held that there could be no eventual collocation. But why not ? Why should a wife, the holder of an undoubted claim for £4,800, which claim she would have at once recovered if she had repudiated the community, be deprived of her marriage portion, because her husband's portion is sold before she has been enabled to go through the formalities required by law ? It is said that the house was her own, likewise if the house had been a "propre" she would have had no legal hypothec upon her own Estate ; but on a "conquet" of the community She has a legal hypothec, provided that, by her renunciation of the Community, which carries her renunciation of joint-ownership, she places herself, as she may, in the position of creditor ot her husband, for her jointure, instead of co-proprietor of the "conquet." Why then should her rights, if they are real and true, be liable to disappear entirely, when they can be collocated provisionally ? Who can suffer from this conditional collocation ? Not the creditors anterior in rank, they have priority ; not the creditors posterior in rank, they knew or might have known, when they became creditors, that their claim might be subject to the rights which the wife drew from her marriage settlement. They knew or might have known that if her husband became insolvent, she could apply for a separation of property, that she would then have the right to repudiate the community and stand on her "Apport."

When the case came before the Master, the wife showed a liquidated claim, *primâ facie* at least ; she had applied for a separation as to property. Of course, it would not have been right to collocate her unconditionally, for she might not have obtained her separation ; she might not elect to repudiate the community, she might have been stopped ; and in any of those contingencies, the subsequent creditors would come in.

If no such contingency arose, there would be no reason to prevent the using of her legal rights. A conditional collocation whilst it shields the wife, protects the subsequent creditors. Now, is there any law to preclude such conditional collocations ? There is none ; on the contrary it has been held, under Art. 2,195, relative to the wife's legal hypothec, "Que la femme, quoi-" qu'elle ne se soit pas encore fait séparer de " biens, peut se présenter à l'Ordre et réclamer " sa collocation, à la date de son hypothèque lé-" gale, sauf aux Tribunaux, après avoir colloqué " la femme au rang que la loi lui assigne, à pour-" voir à ce que les fonds restent entre les mains " de l'acquéreur, ou qu'il en soit fait tout autre " emploi jusquà l'instant ou elle pourra les rece-" voir et en donner quittance valable."

Crog Chanel. C. Cass : S. V. 21, 1, 422, *Vivarie v. Thioch*, Montpellier, 19 Mai 1824.

In the case before us, the difficulties which might arise, where the wife has only undetermined rights, do not stand in the way of the Appellant ; her rights are proved by her marriage contract, and so far as we can see, liquidated; and supposing that they are liable to reduction, the conditional collocation she has applied for, will allow the husband's creditors to have such reduction effected, without fear or danger that the amount of the collocation shall have been squandered away.

We have no evidence that the Appellant has been guilty of laches, and it is unnecessary to decide here what degree of laches would endanger her privilege. At the same time the "Ordre" must be closed and should the Appellant not elect, in due time, whether she will repudiate the Community, it will be the right of the creditors, whom her superior privilege excludes, to take the opinion of the Court on the matter, so that the fate of the conditional collocation be finally determined.

The Court whilst ordering a conditional collocation on behalf of the owners of this inscribed legal Hypothec, has power to decree what shall be done with the amount of such collocated claim. We therefore are of opinion that the decree of the Master be reserved ; that the claim of Mad : Dubois St. Alme be collocated conditionally, and that the purchaser of the house in question do pay the amount of the conditional collocation into the hands of the Master of the Court, to be dealt with in execution of the Judgment of this Court, or according to subsequent directions should the case arise for subsequent directions. We also think that the Respondents should pay the Costs.

SUPREME COURT.

APPEL D'UN JUGEMENT DU MASTER,—REFUS DE PROROGER LA VENTE D'UN IMMEUBLE APPARTENANT POUR UNE PORTION A UN FAILLI,—EVALUATION DES IMPENSES ET AMÉLIORATIONS FAITES PAR LE FAILLI.

Il n'y a point lieu de proroger la vente d'un immeuble appartenant pour une portion indivise à un Failli, sur le motif qu'il convient de faire

évaluer certaines impenses et améliorations faites sur le dit immeuble, par le failli, de ses deniers personnels ; les Syndics pourront toujours faire procéder à cette évaluation et exercer leur recours sur le prix de vente.

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APPEAL FROM A DECISION OF THE MASTER,—REFUSAL TO STAY THE SALE OF AN IMMOVEABLE PROPERTY BELONGING FOR AN UNDIVIDED PORTION TO A BANKRUPT,—VALUATION OF THE BUILDINGS SET UP ON THE PROPERTY BY THE BANKRUPT AT HIS OWN PRIVATE EXPENSE,—COSTS.

The sale of an immoveable property, belonging for an undivided portion to a Bankrupt, ought not to be stayed in order that the Assignees may ascertain the value of certain buildings erected thereon at the Bankrupt's expense.

The Assignees may do so at their own expense but without staying the sale, being entitled to exercise their rights ultimately on the purchase price.

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CAMPBELL,—Appellant.

Versus

SÉNÈQUE AND OTHERS,—Respondents.

—

Before :

His Honor MR. JUSTICE BESTEL, and
His Honor MR. JUSTICE COLIN.

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A. LEGALL, —Of Counsel for Appellant.
E. DUVIVIER,—Appellant's Attorney.
S. J. DOUGLAS,—Of Counsel for Respondents.
V. LAVAL, —Respondents' Attorney.

—

21*st August* 1866.

This was an Appeal from a Decision of the Master, dated March 13th 1866, refusing to stay the sale of a plot of ground, with a corn-mill and buildings erected thereon, situate at Black-River. The application was made at the request of the Assignees of Sénèque, now a Bankrupt, to the effect that the sale of the real property, at the Master's Bar, should be stayed until a certain valuation of the said corn-mill and buildings has been made, in as much as it was alleged that the said mill and buildings had been set up by Sénèque himself, after his wife's death, and that the special price thereof should go to his Estate.

A. LEGALL, for the Appellant, argued that the Community having been dissolved by the death of Mme. Sénèque, and the mill and buildings erected since her death, Sénèque had a right to charge for the price thereof, and therefore his Estate sould be entitled to have the same valued, so that the price should not fall into the joint-Estate of his children and herself.

S. J. DOUGLAS, for the Respondent. I object, the land and buildings go together, if Sénèque who has never accounted to his children, is their creditor, let him make good his claim, for, assuredly, this is a kind of partnership account; but why should this stay the sale? The presumption is in favor of the joint-Estate having paid for the improvements. Are we to stop until it has pleased Sénèque to bring an action and make it good? Now, can this prevent land and buildings to be sold together?

JUDGMENT.

This case, in its present shape, does not seem to us of any great importance. The Assignees of Sénèque allege that the corn-mill and appurtenances erected on the plot of ground situate at Black-River, and which it is proposed to sell, have been set up by Sénèque, himself, since his wife's death, and therefore since the dissolution of the community of goods between his said late wife and himself, and that they have been so set up at Sénèque's private expense, not with the joint funds of himself and children.

It is very true that the Community is dissolved although no inventory of goods has taken place; but it is also true that *prima facie*, the buildings erected on the land go with the land. Sénèque's affidavit is the only evidence to shew that the mill was built at his own private expense; and Sénèque who had nevertheless his children's property in his custody and keeping, and has not accounted for it, explains, when examined, that he put up the mill with the money which had belonged to the Community, and that he took part of the income which belonged to his children.

We must say that we do not attach much weight either to the affidavit or subsequent examination of Sénèque; and it may be that the facts are such as the Assignees suppose them, it may be also that their interest really prompts them to have a survey and a valuation of the mill made, there is nothing to prevent their doing so, for ulterior purposes, at their own expense; but the Master, we think, rightly declined to stay the sale indefinitely upon an application of this nature. There was really no issue before him tending to show that Sénèque, and therefore his Assignees, were creditors of the children Sénéque for sums expended in the erection of a corn-mill by Sénèque alone. The discussion which may arise between Sénèque and his children cannot possibly prevent a purchaser from having a good title, since there is no question that land and building belonged to Sénèque and his children; and whatever issue may be raised as to who shall get the purchase price, or any portion thereof, cannot touch the right of property; therefore no purchaser can be debarred from buying by the fact that Sénèque or his assignees may set up a claim to get a larger portion of such price than Sénèque's children.

The only practical use that we can see for this application is to enable the Assignees of Séné-

ıe to make up a case subsequently, by ascerıining the present value of the buildings in queson, apart from the land.

They may do so at their own instance and at ıeir own expense, but we are satisfied that there ʻas not enough before the Master, to convince ım that he ought to order an official survey and aluation of the whole concern, and to stay proeedings in the mean while.

Appeal dismissed with costs.

SUPREME COURT.

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PROCÉDURE,—"DEMURRER,"—"PAPER-BOOKS," —ACTION EN DOMMAGES ET INTÉRÊTS CONTRE LA COMPAGNIE DES CHEMINS DE FER,—PRÉROGATIVES DE LA COURONNE.

'Roi n'est lié par aucun Statute si il ne soit ex- "pressément nosmé." Cette prérogative de la Couronne n'est appliquable que lorsqu'il s'agit de questions qui affectent ses biens ou ses privileges; mais le gouvernement est tenu, dans tous les cas, d'observer les lois et coutumes qui réglent l'administration de la justice.

Le Gouvernement peut, sans autorisation de la Cour, contester à la fois les faits d'une demande et, par voie de "Demurrer," le point de droit qui en résulte, mais les parties doivent déposer au Greffe leurs conclusions par écrit (Paper-Books).

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PLEADINGS,—DEMURRER,—PAPER-BOOKS,—ACTION IN DAMAGES AGAINST THE RAILWAY COMPANY,—PREROGATIVE OF THE CROWN.

"Roi n'est lié par aucun Statute si il ne soit ex- "pressément nosmé." This rule, although general, applies only where the property or peculiar privilege of the Government are affected; but the Crown is bound with respect to the practice in the administration of justice.

The Crown may, without leave of the Court previously granted, plead and demur at the same time; but Paper Books ought to be filed.

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MERCIER AND ANOR.,—Plaintiffs,

Versus

BOYLE,—Defendant.

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Before:

The Honorable Mr. JUSTICE BESTEL, and
The Honorable Mr. JUSTICE COLIN.

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J. COLIN, —Of Counsel for Plaintiffs.
E. LAURENT, —Plaintiffs' Attorney.
S. J. DOUGLAS,—Of Counsel for Defendant.
J. BOUCHET, —Defendant's Attorney.

6th September, 1866.

In this case, which was an action brought to recover damages against the Defendant, in his capacity of Chief Commissioner of Railways, for certain wrongs and grievances set forth in the Plaintiff's Declaration, the Defendant demurred and pleaded without leave of Court.

When the case came on for trial, S. J. DOUGLAS, for the Defendant, stated that, in virtue of the prerogative of the Crown, a Demurrer and a Plea had been filed without leave of the Court, and that, on that account also, he had not deposited paper-books.

JS. COLIN, for the Plaintiff, admitted that the Queen might plead and demur in Her own Court without leave, but maintained that it was necessary that paper-books should be filed.

DOUGLAS, in reply, argued: That on the authority of the maxim "Roi n'est lié par aucun "statute si il ne soit expressément nosmé," the Government was not bound to submit to the provisions of the Rules of Court, which, following the English Rules of Court, required demurrer-books to be deposited. STEPHEN, *on pleadings*, shews that demurrer-books were not, at first, necessary in England; they have been introduced by legislative enactments and Rules. The Crown is not named in those Rules and therefore not bound thereby. He cited BROOM'S *Maxims*: "Roi n'est lié." M. & W. 16. Page 177. *Att. gen*: v. *Donaldson*.

JUDGMENT.

The general rule, undoubtedly is, that the Crown is not bound by the words "party to a suit." It is a well established rule, says B. ALDERSON, in *Att. Gen.* v. *Donaldson*, generally speaking, in the construction of Acts of Parliament, that the King is not included unless there be words to that effect. But the rule, although general, applies however only where the property or peculiar privilege of the Crown are affected, and this distinction, says BROOM, is laid down that where the King has any prerogative, estate, right, title or interest, he shall not be barred of them by the general words of an Act, if he be not named therein; but the Crown may be barred, even impliedly, of such inferior claims as belong indifferently to Him or the subject; and so it was held in *Rex* v. *Wright and A.* and *Ellis*, page 447. touching the application of the Act. 11. G. 4 and I. Will. 4. C. 70, entitled an Act for the more effectual administration of Justice. In that case CH. J. TINDAL, delivering the Judgment of the Court of Exchequer Chamber, said: There is neither authority nor principle for implying the exception of criminal cases (*i. e.* in the return of writs of error) upon the ground that the King, as the public prosecutor, is not mentioned in the Act, and in the *Att. Gen. Bar-loff* 10 EXC. 94; CHIEF BARRON POLLOCK observed that: "The Crown is not bound with reference to matters affecting its property or person, but is bound with respect to the *practice* in the administration of Justice."

Now, the Crown has an undoubted right

to demur and plead without leave in Her own Court, but as the administraion of Justice and the practice require that demurrer-books should be deposited, and as the object of that Rule and the antecedent practice is here, as in England, better to cause the points to be argued on Demurrer to stand out in relief before the Judges who try the case, it is difficult to perceive why that practice should not be followed in the case where the Demurrer comes from the Crown. It is essentially one of those rights which belong conjointly to the Crown and to the subject, it is in the words of the Chief-Baron a matter connected witb the practice in the administration of Justice. This is so true that although in the *King v Woollett*, 3, Dowlins 694, it was held, by the Court of Exchequer, that a Demurrer to a Plea, on an Information on the Revenue side of the Court of Exchequer, does not require a matter of Law to be stated in the margin, according to Rule 2 of H. 24, W. 4, yet the Court in that same case actually made a Rule absolute to set aside a Demurrer to a Plea to an Information, because the Attorney General had not signed the Demurrer according to practice. And yet the Crown is not expressly named in the Rule whereby a Demurrer must be signed by Sergeant or Counsel. Nor is the Attorney General *Virtute Officii* implied by those words. No case has been cited to show that paper-books have ever been dispensed with, whenever the Demurrer was filed by the Crown.

Whilst, therefore, we think that, as a general rule, the Crown is not bound by any Statute, if not expressly named to be so bound, yet we agree with the authorities cited that there are certain rulos of practice, immediately touching the administration of Justice, to which does not apply this general maxim, evidently framed to cover the rights and prerogatives of the Crown, but in no wise inteded to throw impediments in the way of the more effectual administration of Justice.

* We think it is the prerogative of the Crown to plead and demur without leave of this Court, but we think that demurrer-books ought to have been deposited. They have not been deposited; and therefore, on the authority of *Abraham* v. *Cook*, 3. Dowlins, Page 215, the case must be struck out

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SUPREME COURT.

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APPEL D'UN JUGEMENT DE COUR DE DISTRICT,—PROPRIÉTAIRE ET LOCATAIRE,—CONGÉ ÉCRIT ET CONGÉ VERBAL,—PREUVE.

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APPEAL FROM A JUDGMENT OF DISTRIT COURT,—LANDLORD AND TENANT,—NOTICE TO QUIT GIVEN VERBALLY AND IN WRITING,—EVIDENCE.

—

ALLARAKIA,—Appellant,

Versus

RONDINEAU,—Respondent.

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Before His Honor Mr. JUSTICE COLIN.

L. ROUILLARD, —Of Counsel for Appellant
J. PIGNÉGUY, —Appellant's Attorney.
P. L. CHASTELLIER,—Of Counsel for Respondent.
A. J. COLIN, —Respondent's Attorney.

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17*th August* 1866.

This was an Appeal against a Decision of M Self, Senior District Magistrate of Port Louis 11th May 1866, and whereby the Defendant now Appellant, was ordered to pay to the Plaintiff, now Respondent, the sum of $250, for tw months' rent of a real property in Hospital street, Port Louis.

L. ROUILLARD, for the Appellant, urged that the Magistrate was wrong in his practice to require notices to be served by Ushers, that written notices were not necessary; provided a verbal one could be proved, that was enough; and besides that if repairs were due by the tenant, the occupation ought not to be made to continue merely because such repairs had not been made. He then argued on the evidence in the case, maintaining that sufficient notice had been given on 30th December 1865.

P. L. CHASTELLIER, for the Respondent, argued: That no notice had been given at all; the point was not whether there should be written notice or verbal notice, there ought at all events to be a notice, there was none until the end of January, and then a most unsatisfactory one. The evidence was clear in favour of the Respondent.

JUDGMENT.

In this case several interesting questions have been argued which, I do not think, the merits of the case call upon me to adjudicate upon. It is not necessary, under the circumstances, to decide whether a notice to quit should be in writing, whether it should be served by an usher, or whether a letter duly delivered will suffice. If I could gather from the Record that the Decision of the Magistrate below had gone upon one of the questions argued before me, and that he had taken an erroneous view of the law, it might have been necessary to lay down what I consider the true construction of the law; but I find that the Magistrate has given Judgment for the Plaintiff, after having heard witnesses on both sides, and it does not appear that he has travelled another ground than that covered by the evidence.

The question then, whether notice be or be not necessary, does not arise; the question is: Has there been notice at all given by the tenant to the Landlord? And that point again resolves itself into this issue: Was notice given on the 30th December last? For if not then given, the Defendant does not set up any other notice.

The Defendant said that he did give notice by a letter which his clerk delivered into the hands of Mr. Bouffé, the Plaintiff's agent. That fact is distinctly denied by Bouffé, and it is perfectly plain that if the Defendant does not make out this fact, he cannot set up as a notice the other

fact, which arises in the case, that on the 31st of January the keys were thrown in the Landlady's yard, a mode of notice more summary than satisfactory.

On looking at the evidence, I think it clear that there has been hard swearing on one side, and I agree with the Magistrate that the weight of evidence is in favour of the Plaintiff now Respondent. The accounts given by the Defendant's clerk's do not agree. Whilst the one states that the letter was delivered into the hands of Bouffé, who was sitting in a chair and said "very good," the other states that the letter was delivered not by the other clerk, but by Defendant's own son, not into the hands of Bouffé but into the hands of one Durand, Bouffé's clerk; a circumstance which Durand positively denies, just as Bouffé denies having received any letter personally. The evidence for the Plaintiff is consistent in that, for the Defendant, I find discrepancies on very material points. It was attempted to gather from a notice served by the Plaintiff's Attorney, that a notice to quit had been duly given; there can be no doubt in my mind that the notice in question applies to the summary tender of Keys to which I have already alluded and not to any anterior notice to quit. I wish it to be clearly understood, that I do not decide against the Defendant the points of law urged on Appeal on his behalf. I wish it also to be understood that I say nothing of the statement made that the practice of the District Magistrate is to repudiate all notices to quit that are not served by ushers. I am clearly of opinion that the points have not fairly arisen for our consideration; that in this case no notice of any kind has been proved to the satisfaction of the Magistrate below, and that on the evidence as it stands, the case was rightly decided; and I dismiss the appeal, with costs.

BAIL COURT.

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ADULTÈRE,—PREUVE,—APPEL D'UN JUGEMENT DE LA COUR DE DISTRICT,—C. P. ARTS. 254 ET 255.

Une plainte en adultère ayant été portée devant la Cour de District, par un mari contre sa femme et son prétendu complice, la femme fut reconnue coupable et le prétendu complice acquitté.

Sur l'appel interjeté par cette première, la Cour confirma le Jugement, mais ne put reviser cette Décision relativement au prétendu complice, aucun appel n'ayant été fait quant à celui-ci, du Jugement qui le déclarait non coupable.

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ADULTERY,—EVIDENCE,—APPEAL FROM A CONVICTION OF DISTRICT MAGISTRATE,—P. C. ARTS. 254 AND 255.

A wife and her alleged paramour were tried before a District Magistrate for living in a state of adultery. The wife was convicted; the alleged accomplice acquitted. The wife appealed. The Court affirmed the Judgment against her, but there being no appeal in the case of the man, the Court could not review the Decision of the Magistrate, in his case.

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LABAUD THE WIFE,—Appellant,

Versus

LABAUD THE HUSBAND,—Respondent.

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Before:

His Honor the CHIEF JUDGE.

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E. PELLEREAU —Of Counsel for the Appellant.
U. HITIÉ —Appellant's Attorney.
S. J. DOUGLAS —Of Counsel for the Respondent.
J. BOUCHET —Respondent's Attorney.

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18th September, 1866.

The Appellant, the wife of one Labaud, was tried before the Junior District Magistrate of Port Louis, at the instance of her husband, on a charge of "living in a state of adultery with one Edouard Nayna."

The Appellant and her alleged paramour were apprehended and brought before the Magistrate, for trial. They pleaded not guily. The Court convicted the wife and sentenced her, under Art. 254 of the Penal Code of the Colony, to imprisonment for six months and to pay the sum of £1 8s of costs, and in default of payment, to a further imprisonment with labour, for the space of 9 days. The alleged accomplice was acquitted, in the words of the Judgment below: "for want of sufficient proof of culpability."

The wife appealed and maintained that if the evidence was insufficient to convict the man, it was necessarily insufficient to convict her, and that she accordingly ought to have been discharged.

THE COURT.

The rules of evidence, in cases of this description, established in France and in this Colony, are peculiar; Art. 255 of our Penal Code declares: "The only evidence that can be adduced against "the person accused of being an accomplice (of "the wife) shall, besides the very deed itself, "(*flagrant délit*) be such as may be deduced "from letters or other documents written by the "party so accused." Now, in the present case, no writing was produced against Nayna, and I presume the Magistrate was of opinion, on the evidence, that the witnesses did not prove a case of "the deed itself" or *flagrant délit*; for, if so, the paramour must also have been convicted. I do not feel myself called upon to give any opinion on that point, as the case of the man is

not before me, on appeal. The only Appellant is the wife. I must confine myself to her case. I am quite satisfied that the Magistrate was right in convicting the wife, the now Appellant. There is no doubt that all the evidence adduced was evidence legally admissible against her.

The Appeal must, therefore, be dismissed, with costs.

BAIL COURT.

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CROIX OU MARQUE TENANT LIEU DE SIGNATURE, —NEW TRIAL, — DOCUMENTS PRODUITS DEVANT UN MAGISTRAT DE DISTRICT,—LEUR RETRAIT DU RECORD,—APPEL.

La croix ou marque d'une partie à un sousseing-privé ne peut remplacer sa signature.

Les documents et titres produits dans le cours d'un procès devant un Magistrat de District doivent être deposés au "Record" et ne doivent pas en être retirés sans la permission du Clerc de District.

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CROSS OR MARK INSTEAD OF A SIGNATURE,— NEW TRIAL,—DOCUMENTS USED AS EVIDENCE BEFORE A DISTRICT COURT,—WITHDRAWING THE SAME FROM RECORD,—APPEAL.

A private writing subscribed with a mark or cross, instead of a signature, is inadmissible as evidence.

Documents put in before a District Magistrate should not be withdrawn without the knowledge and leave of the Clerk of Court.

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ARNASALON,—Appellant,

Versus

RAMSAMY,—Respondent.

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Before His Honor the CHIEF JUDGE.

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H. WILSON, —Of Counsel for Appellant.
U. HITIÉ, —Appellant's Attorney.
L CHASTELLIER,—Of Counsel for Respondent.
A. PITOT, —Respondent's Attorney.

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18*th September* 1866.

This was an Appeal from a Judgment of the District Magistrate of Plaines Wilhems, sitting on the civil side.

In the Court below, the Respondent, Ramsamy, demanded from the Appellant, Arnasalon, the restitution of the sum of $152 which, he said, he had advanced to him and was evidenced, as he alleged, by a writing bearing the date of 7th October 1864.

At the trial, the Defendant pleaded that there was a commercial partnership between him and the Plaintiff, for dealing in vacoa and sugar bags, and that, consequently, the District Magistrate had no jurisdiction. The objection was overruled, for there was no legal proof of any partnership, and Judgment was given for the Plaintiff.

The Defendant obtained a new trial on certain allegations in point of fact, one of which (3rd Paragraph) was that he had certain receipts in his possession which he had mislaid; the new trial was granted, but "under the reasons contained in the 3rd paragraph, of the application." On the day of the new-trial, the Defendant contended that he had a right to open up the whole case, and to be heard on all his pleas, as if that had been the first trial. The Plaintiff contended that he could only be heard on the point referred to in the 3rd paragraph of his reasons, and the Magistrate adopted this latter view. The receipt produced by the Defendant bore only to be subscribed by the cross of the Plaintiff Ramsamy, and was rejected by the Magistrate, who refused to allow parole evidence in support of such a paper, or to prove a payment by Arnasalon to Ramsamy of the sum originally advanced by the latter to the former, and gave Judgment, of new, in favour of the Plaintiff Ramsamy.

Arnasalon appealed.

Counsel were heard on both sides.

THE COURT.

Taking the case on the broad ground in which the Appellant wishes to place it, *viz*: That at the second trial he was entitled to go into the whole case *de novo*, what are the pleas which he submits to the Court?

In the first place, he says: that there was a certain commercial partnership between the parties here, and that a resort to the District Magistrate, instead of an arbitrator, in such a case, was incompetent. But there is no evidence of any such partnership here, and consequently the plea itself does not arise. The Court has repeatedly decided that ordinary writings between parties, to which a cross or mark has been merely adhibited, instead of a signature, cannot be accepted as evidence of what they purport to contain. (See particularly case of *Gonapen and Anor v Ramsamy*. PISTON'S Reports. Vol. 5. Page 18.)

The alleged receipt for repayment of the money to Ramsamy, by the Plaintiff, is exposed to the same objection.

It is not subscribed by Ramsamy. The Magistrate has found it ineffectual on this ground and I must support his Judgment. I am also of opinion that he could not admit parole evidence in such a case.

In the course of the discussion before me, an incident occurred, which I cannot pass over, without notice. One of the Counsel produced two documents which the other objected to as not being in the record. They bore the mark of the District Clerk, but the Counsel producing them admitted that, while, in point of fact they had been produced before the Magistrate, they had been withdrawn and latterly remained in his possession. The Magistrate, on a remit made to him to inquire into the facts, has certified that the two papers in question were filed on the 13th of June last, after the new trial had been granted, that they had been taken back without leave or consent of the District Clerk and "they were not produced in "evidence on the hearing of the new trial," (25th July last.)

I trust that such an irregularity will not occur again.—Documents should never be taken away without the knowledge and leave of the Clerk of Court and they ought to be returned as promptly as possible, when they have served the purpose for which they were properly required.

The Appeal is dismissed, with costs.

SUPREME COURT.

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DIVORCE,—ABANDON DU DOMICILE CONJUGAL,—C. C. ARTS. 212, 213, 214, ET 231.

L'abandon du domicile conjugal par l'un des époux n'est pas, par lui-même, une cause de divorce, lorsqu'il n'est pas accompagné d'autres faits outrageants et injurieux.

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DIVORCE,—DESERTION OF THE CONJUGAL RESIDENCE,—C. C. ARTS. 212, 213, 214, AND 231.

Desertion by one of the spouses is not per se *a sufficient ground of divorce, some other fact of outrage must be joined with it.*

Desertion must be established both animo et facto.

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ARLANDA THE HUSBAND,—Plaintiff,

Versus

ARLANDA THE WIFE,—Defendant.

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Before:

His Honor the CHIEF JUDGE, and
The Honorable Mr. JUSTICE BESTEL.

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J. L. COLIN, —Of Counsel for Plaintiff.
W. FINNISS, —Plaintiff's Attorney.
P. L. CHASTELLIER,—Of Counsel for Defendant.
A. PISTON, —Defendant's Attorney.

17th August, 1866.

(See 1864-1-93-1865-3)

This action for a divorce *à vinculo matrimonii* was originally undefended and unopposed by the wife.

JULES COLIN was summing up the evidence adduced in support of the Plaintiff's demand when the wife appeared in Court, in person, and through her Counsel P. L. CHASTELLIER, stated that the only ground alleged for the divorce prayed for by her husband was her absence from the conjugal roof, that her prolonged absence therefrom had originated in and had been continued from dread, on her part, of further ill-treatments from her husband who had but very lately refused to receive her under his roof at two different times. She further expressed her willingness to return to her husband, thus, putting an end to the suit.

On being asked by his Counsel whether he was willing to take back his wife, the Plaintiff refused to do so.

In order to verify the correctness of the facts alleged by the Defendant, the Court ordered that those persons who had accompanied her to her husband's house, should be examined.

This examination took place on the 15th March now past, when one Charles Autard, on oath, deposed "that, in company with the brother of "Defendant, he accompanied the latter, 30 or "40 days previous, to her husband's house. We "arrived, says the witness, at half past four P.M. "Arlanda had not come. A few minutes after-"wards we saw him before his door. I told "Mrs. Arlanda that it was time to go to her "husband's home. As soon as "he saw his "wife, he entered the house and shut all the "doors. Seeing the house closed we all re-"turned. I accompanied Mrs. Arlanda on a "second occasion, about a fortnight ago. Mrs. "A. her brother and myself. We waited till 7 "o'clock P.M. Seeing that Mr. A. had not "come, we returned. The second time we "went, we saw some Indians there, we did not "speak to them."

This deposition is corroborated by that of the Defendant's brother who, further, states that on the first occasion, as soon as the Plaintiff saw his wife at his door, he, the Plaintiff, entered the house and shut the doors: "we waited," this brother adds, "at the door, a short time; not "seeing any one we went away."

The same dread of ill-treatment had been expressed by the Defendant, when, in execution of the Writ of this Court, she was taken back to her husband's home by the Usher Lecudennec, to whom she said that she had been ill-treated. This fear of ill-treatment accounts for the Defendant's having said to her sister, on leaving her to accompany the Usher to her husband's house, that she would return as soon as possible, and for her saying to the Usher that she would not remain with her husband. True it is that the Usher deposes and so does another witness, Lu-

cien Gautier, that she was very kindly received by her husband.

The kindness of her husband's reception had not, however, the happy result of dispelling her fear of further ill-treatment, similar to that already experienced; the existence of which has been recognized by Judgment of this Court of the 5th January 1865, between the same parties, wherein is to be found the following remarks: "But it cannot escape observation that the conduct of the Plaintiff towards the Defendant "has not been good, and if she has left his "house, it has not been without reason."

The Plaintiff complained of the tardiness of the Defendant's appearance in Court, and of the opposition to the allowance of the Plaintiff's demand. Were such an opposition to be allowed at this late hour, it would be putting into the power of the Defendant, to defeat a most just demand and to entail upon an innocent and injured husband, endless costs. For, in this case, the feelings of the husband have been so hurt, that there is no chance of his ever forgetting the injury done to his feelings as a man and as a husband. Harmony is not to be expected, ever, again to prevail between this couple. Should the husband fail in this his second action for divorce, we must expect ere long another action will be brought for the same end.

The past conduct of the wife, in forsaking her husband and his house, for such a long space of time, before and after having been taken back to the conjugal establishment, without cause, unless it be mere dread of imaginary ill-treatment, entitles us to infer that she has made up her mind for ever, to abandon her husband, contrary to the provisions of the law, (Arts. 212, 213, 214, C. C.) leaving the husband alone to struggle thro' and with the difficulties of life, on the one hand, and exposing him sooner or later to have his name disgraced and dishonoured by the misconduct of a young woman, whose morality may be justly suspected, from the want of regard she has hitherto shewn to the feelings of her husband.

The "Ministère Public" concluded against the admission of the divorce, on the ground that the absence of the wife from the conjugal domicile being due to the ill-treatment of her husband, the latter might, by amending his conduct towards his wife, hereafter, secure to himself the presence of his wife, and expect to derive from his marriage all the advantages he anticipated therefrom.

JUDGMENT.

The Court dismissing a previous action in divorce, brought by the same Plaintiff against his wife, on the ground that desertion by one of the spouses is not of itself a ground of divorce, availed itself of that opportunity of observing that the conduct of the Plaintiff towards his wife had not been good, and that if she left his house, it was not without reason. (See Judgment of the Supreme Court. PISTON'S *Reports*. 1864 page 2.)

This was a suggestion to the husband that the happiness of a conjugal life, which he complained of having lost, was still within his reach, and might be recovered on a change of conduct towards his wife.

This suggestion was unfortunately unheeded by the husband and the fears of the wife, still alive and increased by the fact of the Plaintiff's twofold refusal to receive her into his house, are so many reasons for the Court turning a deaf ear to this his second complaint, by dismissing this action as it did the first, and thereby protecting the sanctity of the marriage bond.

Action dismissed, with costs.

BAIL COURT.

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SAISIE-ARRÊT,—TIERS SAISI,—DÉCLARATION AFFIRMATIVE,—DOMICILE,—COMPÉTENCE,—APPEL DE JUGEMENT DE MAGISTRAT DE DISTRICT,—ORD. 34 DE 1852, ART. 75.

Le tiers saisi doit être assigné en déclaration affirmative devant le tribunal de son domicile.

La compétence de la Cour de District est déterminée par la somme principale de la demande, indépendamment des accessoires.

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ATTACHMENT,—GARNISHEE,—DOMICILE,—"DECLARATION AFFIRMATIVE,"—JURISDICTION.—APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE,—ORD. NO. 34 OF 1852, ART. 75.

A party who recovered Judgment in a District Court attached a sum of money in the hands of an alleged debtor of his debtor. The Garnishee resided in another District and was summoned to appear in the Court of the District where Judgment was recovered, but where he did not reside. The proceedings were held to be incompetent and were dismissed, with costs.

—

SENGEN,—Appellant,

Versus

Js. FRASER,—Respondent.

—

Before:

His Honor the CHIEF JUDGE.

—

P. L. CHASTELLIER,—Of Counsel for Appellant.
A. PITOT, —Appellant's Attorney.
W. NEWTON, —Of Counsel for Respondent.
H. BERTIN, —Respondent's Attorney.

—

5th September, 1866.

On the 23rd February 1866, the Appellant, Sengen, a trader, of the District of Flacq, re-

covered Judgment in the Court of the District, against Arthur Fabre, for the sum of $239.93, with interest and costs. The aggregate amount, including interest and costs, was £60.15.5.

For this latter sum, an attachment, by order of the District Court, was laid in the hands of Mr. Jas. Fraser, Merchant at Port Louis, on the 2nd April 1866.

J. Fraser was summoned to appear on the 30th April. He did not attend, but Counsel stated on his behalf that the Court was incompetent as the amount was beyond $250, and this plea was sustained by the Judge.

Sengen appealed and submitted that the plea of Fraser could not be received as, by Article 76 of the Rules and Orders of the District Courts, being a Garnishee, Fraser was bound to attend the Court in person, and not having done so, the Court should have found him liable "pur et simple" for the amount recovered by the attachment, *viz*: £60.15.5.

The Appellant further argued that in determining the sum for which the Court is competent, the amount of interest and costs being mere accessories of the sum demanded, ought not to be taken into calculation.

THE COURT.

Altho' it has not been pleaded by the parties, I am bound to consider whether the District Court of Flacq had any jurisdiction over the Garnishee, Mr. James Fraser, whatever may have been the amount of the sum attached in his hands. To say that Mr. Fraser was bound to attend in person is to assume that the Court had jurisdiction over him. Now I cannot see that this has been established. On the contrary, I am satisfied that the jurisdiction he owed in such a case was to the Magistrate of his own domicile, not to the Magistrate of the District of Flacq. This is clearly provided for by Art. 75 of the Rules of the District Courts, which runs in those terms: "If the seizing party be a Judgment creditor or "the bearer of a Notarial deed in its executory "form, or if, after the opposition lodged, he ob- "tained a Judgment against the party seized, "he shall exhibit to the Clerk of the District in "which the Garnishee is domiciled a duly certi- "fied copy of his Judgment, or of his notarial "deed, in its executory form, and of the Order "of attachment. Whereupon the said Clerk "shall, on the application of the seizing party, "issue a summons to the Garnishee to appear "before the Court of the said District, on the "day as shall be fixed in the said summons, to "give a full statement of the sums by him due "to the Judgment debtor."

If the Court had found it necessary to go into the question of value, it is probable that the argument of the Respondent, as to interests and costs, being mere accessories, would have prevailed, but, on the ground above stated, the appeal must stand dismissed, with costs.

BAIL COURT.

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SAISIE MOBILIÈRE,— REVENDICATION,— APPEL DE JUGEMENT DE MAGISTRAT DE DISTRICT,— ORD. NO. 32 DE 1852.

D'après la Loi organique sur les Cours de District, l'exécution d'une Saisie Mobilière n'a pas besoin d'être attestée par témoins.

Preuves d'après lesquelles les marchandises formant le fonds d'un magasin furent restitués, sur revendication, au vendeur originaire, pour défaut de paiement, la vente faite aux tiers-saisis étant reconnue fictive.

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SEIZURE OF GOODS,— INTERPLEADER,— APPEAL FROM A JUDGMENT OF DISTRICT MAGISTRATE, —ORD. NO. 32 OF 1852.

By our Organic Laws of the District Courts, an execution of Seizure of goods does not require to be attested by witnesses.

Evidence on which a stock in trade was assigned, in an interpleader, to the original vendors, a subsequent sale being held to be fictitious.

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SINNAVASSEN PILLAY & Co.—Appellants,

Versus

KISTNAPEN AND RANGASSAMY,—Respondents.

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Before:

His Honor the CHIEF JUDGE.

—

G. GUIBERT, —Of Counsel for Appellants.
W. HEWETSON, —Appellants' Attorney.
E. PELLEREAU, —Of Counsel for Respondents.
E. MACQUET, —Respondents' Attorney.

—

6th September, 1866.

In this case, the Respondents had sold and delivered certain goods to the firm of M. C. Doorasamy and Company, for the price of $223,19, on the 24th April last. The buyers accepted the account to be paid within 45 days from the said date. On the 24th June thereafter, on an application by the vendors, setting forth their belief that their debtors were about to sell off their stock in trade and had begun to remove their goods from the shop, the District Magistrate made an Order for a provisional seizure.

The Usher proceeded to the shop, where he seized and inventoried a considerable quantity of goods in the face of a protest by the Appel-

lant Sinnavassen Pillay, who was found in the shop and who claimed the goods as the property of himself and partners. He said the articles had been bought by him on the 28th May 1866, from Doorasamy and Company.

The right of property in the articles was tried before the Court below, in an Interpleader. Judgment went in favor of the now Respondents.

Sinnavassen and Company appealed.

Counsels were heard on both sides.

THE COURT.

The Appellants have argued a preliminary objection to the seizure made by the Usher: *viz*: that his execution of seizure is not attested by the signature of witnesses, as required by the rules of the CODE OF CIVIL PROCEDURE, Art. 585. This objection must be repelled, for, by our Organic Law of 1852, regulating the Procedure in the District Courts, Civil side, no such attestation by witnesses is required.

On the merits, we have, in evidence, a deed of sale of the Stock in trade by "Doorassamy and Company" in favor of the Appellants, dated 28th May last. The price was £1,567.64, of which £350 bore to have been paid cash. The Appellants also produced a license to deal in tobacco applicable to the shop in question and for the period from 27th March to 26th September of the present year, and another license as general retail dealers for the same period. It is also shown that Mr C. Doorassamy and the Appellants hold a joint license for the same premises as retail dealers from 18th September 1865, to 17th September 1866. The Appellants were found in possession of the shop and articles where the Usher went to execute the provisional seizure made at the instance of the Respondents, or at least, Sinnavassen Pillay was there and signed the protest against the seizure.

On the other hand the Respondents produced written evidence of the sale by them to M. C. Doorassamy of the goods, the price of which remained unpaid. This sale took place on the 24th April, more than a month before the sale of the shop to the Appellants.

The witnesses examined stated that up to the 11th June, the signboard bore the name of Doorasamy and Company and they transacted business there as the owners of the shop. That on that day their name was removed and on the next day the name of the Appellants was put over the door, for the first time.

In this state of the evidence it appears to me that the learned Magistrate, in the Court below, arrived at a proper and just conclusion in awarding the goods to the original and unpaid vendor. On the proof adduced, of which the import has just been stated, I am satisfied that the justice of the case lies with that claimant.

The appeal is therefore dismissed, with costs.

SUPREME COURT.

HYPOTHÈQUE LÉGALE, — RENONCIATION DE LA FEMME,—DEMANDE EN NULLITÉ DE CETTE RENONCIATION,—EXPROPRIATION FORCÉE.

La femme qui a renoncé à ses droits d'hypothèque légale sur un Immeuble déterminé, vendu par son mari, ne peut demander la nullité de sa renonciation sous prétexte que cet abandon était purement gratuit de sa part.

LEGAL MORTGAGE,—RENUNCIATION OF THE WIFE, —ACTION IN NULLITY OF SUCH RENUNCIATION, —SEIZURE.

The wife cannot claim to have the renunciation which she made of her legal hypothec, on certain Immoveables sold by the husband, rescinded, on the ground that it was made for no consideration.

DIORÉ THE WIFE,—Plaintiff,

Versus

DIORÉ THE HUSBAND & ORS,—Defendants.

Before:

His Honor the CHIEF JUDGE, and
The Honorable Mr. JUSTICE COLIN.

S. J. DOUGLAS, —Of Counsel for Plaintiff.
E. BOULLÉ, —Plaintiff's Attorney.
J. COLIN, —Of Counsel for J. DIORÉ.
V. BOULLÉ, —Attorney for the same.
Hon. H. KŒNIG,—Of Counsel for P. A. Wiehé.
J. PIGNÉGUY, —Attorney for the same.

21*st August* 1866.

This was an action brought by Constance Aurélie Ernestine, the wife of Joseph Dioré, to the effect that "a certain Instrument under private "signatures under date 22nd September 1858, "in so far as it concerned her, and in so far as "she thereby had bound herself to intervene in a "notarial contract of the properties therein men- "tioned by the said Joseph Dioré to the said P. "A. Wiéhé, in order to unburden the same of her "legal mortgage, as also the said notarial contract "of sale of May 4th, in so far as concerned her "and in so far as she had thereby given "main "levée" and consented to the erasure of all in- "scriptions to secure her legal mortgage against "the said Joseph Dioré, so far as regarded the "properties here in before mentionned, be res- "pectively set aside and declared null and void "as having been made without consideration or "benefit to her, or at all events for the failure of

" any consideration, and the non-execution of any " conditions upon which the same may have been " consented and agreed to by her. " The above are the very words of the prayer with which the Declaration concludes and ends.

It would appear that by an act under private signatures between Joseph Dioré, the Plaintiff's husband, Albin Dioré, Probart and wife and Peter Adolphus Wiéhé, the real Defendant in this cause, in which act the Plaintiff herself did intervene, Joseph Dioré agreed to sell to P. A. Wiéhé :

1o. The whole of the Estate l'*Arsenal* ;

2dly. The plots of ground called " *Mignonette* and *Casse-cou*, " contiguous to " *Arsenal* " Estate ;

3dly. The rights of Joseph Dioré to a lease made to one John Davy, of a portion of land forming part of the Estate aforesaid, and also all his rights and profits in the partnership carried on under the style of " Wiéhé & Co, " for the working of a certain distillery called " *Balaclava* " and set up on the said Estate. The reason alleged for the sale was that the Estate had been seized and it was urgent to cause such seizure to disappear. Joseph Dioré having no funds to enable him to pay off the mortgage creditors of the said Estate.

The sale price was $50,000, which Wiéhé undertook to pay to the inscribed creditors, according to the ranking of their privileged or hypothec claims, with interest at 9 o|o per annum. In the act the names of such creditors were set forth and amongst them where Albin Dioré and Mrs. Probart, on account of their legal mortgages and their rights against Joseph Dioré, their father, arising from the fact that they were heirs of their mother the late Eléonore Gautray, the first wife of Joseph Dioré, and that Joseph Dioré, their father, had been their legal guardian during their minority.

It was further agreed that Albin Dioré and Mrs. Probart should be bound to intervene in the deed, by which, the seizure above spoken of was to be erased. It was also agreed that P. A. Wiéhé would register the deed of sale and effect the clearance of legal mortgages, in order that the said Estate be freed of all inscriptions and mortgages whatsoever.

Again it was agreed that after the above formalities had been fulfilled, P. A. Wiéhé should unite into one single Estate the " *Arsenal* " property and the " *Mignonette* and *Casse-cou* " plots of ground, along with the " *Balaclava* " distillery, and that the whole should form the stock of a limited liability partnership, (en commandite) or, if need be, an anonymous co-partnership made up of shares of $1,000 each. Joseph Dioré's interest in the concern was to be of 35 shares or $35,000, the price of " *Arsenal* " proper being absorbed by the creditors who held hypothecs thereon. The Plaintiff further alleged that it was with a view to facilitate such arrangement and in order to benefit her husband, but without the slightest benefit to herself, that she undertook and promised to intervene as aforesaid. The Declaration then proceeded to allege that in part execution of the promises, Joseph Dioré did, on May 4th 1859, sell to the said P. A. Wiéhé the Estates in question and that, she, the Plaintiff, did in execution of her promise intervene in the notarial deed of sale and give " main levée " of and consent to the erasure of all inscriptions taken to secure her legal mortgage in so far as might affect or concern the said Estates.

The Declaration further alleged that the consideration, under which she was induced to renounce her legal mortgage, have entirely failed and the conditions which the said Joseph Dioré and P. A. Wiehé undertook to fulfil, have never been executed or carried into effect.

P. A. Wiehé pleaded that the Plaintiff had no right of action against him, the Plea, then traversed generally and denied the facts set forth in the Declaration, and set forth specially that the Plaintiff purchased from Joseph Dioré the Estates " l'*Arsenal*," "*Mignonette*" and "*Casse-cou*" and all Joseph Dioré's rights in and to a lease made to one John Davy, and further all the said Joseph Dioré's rights in and over a partnership entered between him, the said Dioré, and other parties and carried on under the style of " Hélie & Co."—That the said purchase was made by and according to two Instruments under private signatures, the first of the 22nd September 1858, the second a notarial act under date, May 4th 1859. That the Plaintiff intervened and was a party to both documents and did renounce her legal mortgage, and consented to the erasure of the Inscriptions thereof so far as it might affect the several Estates purchased by the Defendant. That such renunciation and " main levée " were consented to without any condition whatever, and for a sufficient consideration. That the Defendant, to all intents and purposes, has executed all the conditions he had undertaken to fulfil. That if any condition be still unexecuted, that fact is to be attributed to Joseph Dioré alone and cannot affect the validity of the aforesaid Instruments.

The two Defendants, Joseph Dioré, and Mrs. Probart, declared that they should abide by the Decision of the Court ; Joseph Dioré, the Plaintiff's husband, first suffered default, and then, by leave, pleaded that he acknowledged the facts set forth in the Declaration, and had nothing to say in Bar.

The case came on for trial and was partly heard on the 21st March 1866, and by consent continued till the next term, 17th April 1866.

S. J. Douglas, for Plaintiff, argued : After having stated the facts set forth in the Declaration, he said, the whole of this was an arrangement under suspensive conditions, the property had been seized so far back as the 28th July 1851, by one Auguste Louis ; it is manifest that this arrangement could not take place without the radiation of the seizure. In May 1859 a notarial contract of sale is passed between Dioré and Wiéhé who had already entered into possession and taken the administration. This deed is the echo of the first act containing the conditions of sale it merely carries out, so far as this

clause goes, the act under private signatures. Dioré declares that the property sold is not seized and of this Wiéhé cannot complain because it was his business to clear the seizure. Mme Dioré thought the seizure had been erased and she intervened, she was not bound to do so unless the seizure was erased.

The two deeds ought to be construed at the same time, to be taken as one and the same, being in *pari materia* and the first Instrument shows what reasons moved her to undertake what she bound herself to do. Nothing was done to carry into execution the act under private signatures and Mad. Dioré now asks that so much of it as bound her to intervene in the notarial deed of sale, in order to relinquish her rights of legal mortgages and so much of the deed of sale, as goes to the same effect, should be declared null and void Let us see what answer Wiéhé makes to the demand : He says that the purchase was effected in virtue of the two deeds, but how can he say in one breath that he has fulfilled every consideration, since the suspensive condition still exists, since the first step to be taken is the erasure of the seizure, and Wiéhé is the person at whose charge the seizure is to be erased. By his Plea he says that he has fulfilled all the conditions binding upon him, and that the conditions which others should have fulfilled, but have not, cannot touch him. On the 12th May 1864, a formal " mise en demeure " was served upon all the parties but not responded to.

Hon. H. Kœnig, for Wiéhé : The Plaintiff's action is to the effect that her renunciation of her legal mortgage be recinded, *à priori* it seems strange that a woman who has renounced that right, should, as against the purchaser of the Estate, ask to annul her renunciation. Here it is impossible, for her to do so. The contract which is the basis of all is that of the 4th May 1859. In that deed Mad. Dioré refers to another act under private signatures anterior to the notarial deed and from which she seeks to find the reasons which led her to sign that deed.

Mr. Wiéhé is in possession, under charge of making certain payments, but what of Mad. Dioré's mortgage ? In the act under private signatures she promises to give it up, she does so in the notarial deed. She now says she has been deceived by her husband who was to have a share of $35 000, in the co-partnery. Suppose this were true, it would have been Dioré's duty to execute the conditions he promised to fulfil, he promised to free the Estate of $35 000, and then he would get a share of $35,000. Why did not Dioré free the Estate ? Not only he has not paid, but Wiéhé has paid a large sum of money. Dioré himself acknowledges that a sum of $50 000 has been paid by him. It was not absolutely necessary that Dioré should become a partner. By Article 9th of the Act, he might or might not.

Made. Dioré said the Estate was seized, what matter is this to her ? It concerns the purchaser a good deal, but it does not concern her. Besides where is the bond by which Wiéhé bound himself to have the seizure removed ? It is the vendor's duty to do this, unless there be an express stipulation to the contrary. But in reality, Wiehé has paid the seizing creditors, (see the Cahier des Incriptions.) It is said, the sale is null; (Art. 686) but, turn to Article 687, the notification of the seizure was made in 1851, but the creditors are no longer creditors, the Inscriptions have all been struck out or paid. As to the children of Dioré, by his first marriage, Wiéhé may have to defend himself, but this does not concern Made. Dioré.

Douglas, in repply : This action is not one for the cancellation of the sale, the case is that the sale is good. Made. Dioré wants only a certain clause in the contract to be rescinded, because a misrepresentation has been made to her, no matter by whom, but she says by Wiéhé and her husband. It is immaterial to her what may be the state of accounts, between Wiéhé and her husband, but in fact. the debts have not been paid. Has Pierre Dioré been paid or the heirs of Dioré's first wife ? The arrangement contemplated has fallen through, and Made. Dioré is entitled to resume her rights. The motive cause of the arrangement was the removal of the seizure. Suppose she had been, herself, to intervene and had not, could an action have been brought against her to compel her to do so, when the conditions were not fulfilled ? If the heirs of Dioré's first wife, who are now about to liquidate their rights between Dioré and themselves, produce at the " Ordre " of other Estates, they may absorb every thing and Made. Dioré may be prejudiced, since she is excluded from " *Arsenal.*"

JUDGMENT.

Mr. P. A. Wiéhé has become the purchaser of the " *Arsenal* " Estate with adjoining lands and certain other rights enumerated in the deed of sale of the 4th May 1859, which lands and rights he purchased from Mr. Joseph Dioré, 1st, through and by a preliminary contract under private signatures, dated September 22nd 1858, and 2dly, by and through a notarial deed confirmatory of the first contract and dated 4th May 1859.

In the first contract, Made. Dioré, the second wife of Joseph Dioré, intervened and promised to give him a right of legal hypothec, so far as the same might encumber the real property conveyed, but no further ; In the second deed she again intervenes and gives effect to her promise, waiving such legal hypothec.

Joseph Dioré has become, it appears, so embarrassed in his affairs, that the Plaintiff has obtained from him Judgment of separation of property and she now sues Wiéhé, (her husband being made a party to the cause), to have her obligation, whereby she waived her legal hypothec, set aside.

The reasons set forth by her in support of her application are, that she got no consideration for her waiver of her legal hypothec, and again that the conditions under which such waiver was consented to, have not been fulfilled.

She has, accordingly, insisted a good deal upon the two contracts being read together, as it is in the first that she mainly strives to discover conditions, which, as she alleges, have not been fulfilled.

We have read the two contracts separately, and we have read them together.

We have come to the conclusion that whether they be read separately or read together, the result is essentially the same. But, in reality, we believe that although the first must be referred to, it is clearly distinct from the second, which, *à priori* appears, and nothing has been shown to remove this *à priori* conclusion, to have been signed by the parties, solely with a view to give to the first a full and complete execution, and in great measure to testify to such execution.

Made. Dioré after having twice solemnly waived her right of legal hypothec over the "*Arsenal*" Estate sold to Wiéhé, attempts, now that Wiéhé has, on the faith of that promise, paid a very large sum of money to the creditors of Joseph Dioré, to retrace her steps and to resume rights which, had they not been waived, would have placed Wiéhé, the purchaser, under the necessity of clearing Mad Dioré's legal hypothec, but, which, when waived allowed Wiehé to pay off the mortgaged creditors of the Estate, without concerning himself about the value or rank of Mad. Dioré's specific legal mortgage.

It is not very apparent to us that Mad. Dioré made any great sacrifice in waiving her legal hypothec over an Estate already greatly encumbered by hypothecs superior to her own; the price seems to have been fair and reasonable, for no hypothec creditors took steps to have an outbidding on that price, which he might do, by compelling Wiéhé to fix his price at once. But whether Mad. Dioré, in reality, waived a right which might practically be made available over this particular Estate, does not matter; she has chosen to give up that right, promised, in 1858, to do so, and in May 1859 actually did so.

If the law be on her side, she must succeed, and effect must be given to that law, but it seems a strange position certainly, for a wife, to waive a right of legal hypothec over a real Estate, avowedly not for her own, but her husband's benefit, thereby cause a *bonâ fide* purchaser to pay his purchase price and more, and seven years after to attempt to take this position, that whilst the purchaser would not recover from her husband, now hopelessly Insolvent, a portion of the purchase price paid by him for such husband, she would charge *de novo* the real property conveyed, with the full weight of her legal hypothec. To annul the two solemn contracts which are now before us, there must, therefore, be strong legal grounds.

We fail to perceive that there are any.

She complains that she got no consideration; the voluntary surety, the endorser of a note for a friend's accommodation, the waiver, by a wife, of a legal hypothec, may get no direct consideration from the third party who contracts with the principal whom they support, but what does it matter to that third party? He cannot tell what may be the private reasons that have induced the surety, the endorser, the wife, to come forward, but they are no less bound to him, and if this be true as a general principle, how much more true is it in this case, where there was a consideration clearly apparent. Made. Dioré does not waive all her rights of legal hypothec, she distinctly renounces them only so far as they may charge the Estate sold; she reserves them as to all other Estates, and that right of legal hypothec (we have been told in argument that there were several other real Estates sold) may notwithstanding her specific waiver as to "*Arsenal*," be made good against every one of the other real Estates. The consideration evidently was that her husband should not then be absolutely ejected from his Estate, but that by selling it to a solvent purchaser, he should have the chance, under certain contingencies, of obtaining in the shape of shares in an intended copartnery "en commandite," a right of co-ownership in the said Estate. It is of daily occurrence that a married woman having a separate Estate or separate rights, intervenes in such contracts; if she does not, the sale is not surely null, for the Estate sold is the husband's, but the purchaser fixes his price, clears the Estate conveyed of legal hypothec, and pays his price to the first ranked creditors; the wife's intervention to waive the legal mortgage has two objects in view, 1*st*: doing away with the necessity of clearing, as to her; 2*ly*: of allowing the price, to a portion of which she may or she may not be entitled, according to the rank of her own legal hypothec, to go to the creditors, who are ranked up to the total amount.

She, however, states that the conditions under which she promised to renounce her legal hypothec have not been fulfilled. It is remarkable that in her Declaration she sets forth her position in this way that she renounced for the benefit of her husband, not for her own.

Again, she does not allege, neither does either of the two contracts of sale show any condition stipulated in her own personal favour.

She seems to have been and evidently was satisfied that her legal hypothec should charge her husband's other real property.

Now, if there be conditions which Wiéhé undertook to fulfil and has not fulfilled, there might, saving the answer to be given by Wiéhé, be a case, for Joseph Dioré or perhaps for his wife, but if Wiéhé has fulfilled all that he was bound to fulfil, and if it be true, as he alleges, that the conditions as yet unfulfilled, should be fulfilled by Dioré himself, the wife of Dioré cannot set up Dioré's own laches, as a ground of nullities of contract in favor of Dioré or herself.

It would really be a premium upon fraud to allow a wife to remove her legal mortgage, in many cases a myth, so far as its practical realization goes, to induce a third party to purchase from her husband, and when that third party has fairly and honestly fulfilled his share of the conditions, to set up her husband's own negligence to annul the contract, or, which is worse, so to modify it, as to cause the purchaser to pay twice over.

If Mad. Dioré could show honestly any stipulation in her own favour which becomes of no effect

thro' the negligence or default of either party, the case might possibly assume another position, we do not say it would, but it might do so. But here there is absolutely nothing of the kind. Let us see, then, whether Wiéhé had violated, as he is charged to have done, the contract under which he bought.

First, he was to have paid the mortgage creditors, he has paid a great many creditors, and in an account approved by Dioré, on the 28th November 1865, Dioré admits owing $50,969,-40 c. to Wiéhé. Over and above then, what Wiéhé may still have to pay, he is a large creditor of Dioré; besides he has paid off hypothecs as the "Cahier des Inscriptions" shows, for, most are erased as shown by the two certificates of the Conservator of mortgages, at the end of the "Cahier des Inscriptions," and Wiéhé has been subrogated in others. (vide Inscription No. 31.)

But a seizure had been effected and one of the objects of the sale, says Mad. Dioré, was to remove it. We cannot well perceive how Made. Dioré is injured by the fact of the seizure which was effected before her marriage with Joseph Dioré; of course it should be removed and a very practical mode of getting it removed was to pay the seizing creditor, Auguste Louis. The creditor Auguste Louis has been paid, the cause of the seizure has been made to disappear and if the mere formalities of having it erased has not been fulfilled, it was not Wiéhé's business to get the seizure erased, it was the business of Dioré, he was the debtor, he was the vendor, and unless there be an express stipulation to the effect that Wiéhé, the purchaser, shall fulfill that formality, and there is not, the usual course should be followed; it was Wiéhé's business to find the funds to pay off the creditors, he has found the funds, and if this old seizure of 1851, in the name of a paid creditor, still stands in the books, the fault, if fault there be at all, is Dioré's, not Wiéhé's. We say, if fault there be at all, for, if a previous seizure will make a sale by private contract voidable, the purchaser, (Vide Article 687, CODE CIVIL PROCEDURE) provided he deposits the sum due to hypothec creditors and the seizing creditor, before the day appointed for the adjudication, has always the right of maintaining the sale. If driven to it, Wiéhé has still that right. Besides Made. Dioré does not apply for the annullation of the sale made to Wiéhé, her action has quite another object.

It is further alleged that a co-partnery was to be formed, and Dioré have 35 shares of $1,000 each, in that concern. That is not the case; Dioré might (Vide Article 6 of the Contract of September 1858) have shares in the joint stock concern, which was to be formed after certain contingencies to which we shall refer presently, but this was, in no wise, a "*sine qua non*" condition, it was facultative; the contract says "whether he does join or not he shall have leave to have the corn he wants for his baking Establishment, ground at the mill." Before he can join, certain contingencies are to take place, and even if they had taken place he could have summoned Mr. Wiéhé to admit him as a partner and holder of 35 shares; it is doubtful whether after Wiéhé had paid upwards of $50,000 for him on account, he would do so; this however was a question which he would consider, but which does not arise in this case.

As a matter of fact, he has not applied to have the partnership in which he was to hold 35 shares, constituted. How could he do so under the circumstances, even if inclined or able to join Wiehé in the contemplated co-partnery?

The co partnery is to be set up after all the legal mortgages had been raised. But those legal hypothecs barring that of Mad. Joseph Dioré who renounces her own legal hypothec, are in fact those of Mad. Probart, and Mr. Albin Dioré, children of Joseph Dioré, by his first wife. (Joseph Dioré, in the deed of sale of 1859, declares he never was guardian to any minor, except those two children.) Now, one of the sums which Wiéhé undertakes to pay is the sum which shall be found to be due to Made. Probart and Albin Dioré, who, in no wise, renounce their mortgage; until they are paid, they will not consent to remove their own inscribed legal mortgage; when they are paid, they cannot refuse to erase their inscriptions, and Made. Joseph Dioré has already by the deed of 4th May 1859 waived her own and consented to erase it; the clearance of legal mortgages will then be a formality which a purchaser will perform for fear he has been deceived by the vendor when the vendor states he has been guardian to no minor but his two children, but which, if not formally, at least practically, will have been effected by the payment to or renunciation by those who alone held legal hypothecs.

Now, why have not Made. Probart and Albin Dioré been paid? Joseph Dioré alone can answer that question. Wiéhé, we must presume, is prepared to pay them, since he has paid the others, but the sum which they have to receive is not yet determined, it is the amount which will be found to be due to them by their father, their guardian, and that amount, an account of guardianship will determine. Dioré has not chosen to give his account of guardianship yet, and is he to say, or his wife for him, that because he has not chosen to settle accounts with his children and thereby enabled Wiéhé to pay off those children's claim, that his contract will be practically annulled, or worse, that Wiéhé should have paid, and have his Estate charged with a renovated legal hypothec.

The co-partnery which was contemplated was not a *sine qua non* condition, it was, it is true, all things remaining the same, in the power of Dioré to have it constituted and to have 35 shares in it, but it was a facultative power he held which he could exercise under certain contingencies, he has not exercised it, he has become the debtor of Wiéhé, according to an account stated between them, of more than $50,000; the contingencies have not arisen, his own laches has prevented them from arising; we can no where find any blame to attach to Wiéhé who appears to us to have fairly carried into effect the conditions which he had to fulfil, and who, we repeat must, until the reverse be shown, be held ready to settle with the children of Dioré when the children of Dioré have a settled and determined right. But *dies cedit sed non venit*. This seems to us to be the true nature of this

case ; there is however more. We have hitherto treated the two contracts as one contract but in reality the second, that of May 1859, may fairly be construed as one which was signed in due execution of the first. Now, if Mad. Dioré really and honestly believed that all the conditions which Dioré had to fulfil, or Wiéhé could only fulfil if Dioré moved, were to be fulfilled within a certain determined period, if the contract of September 1859 could bear her out in this, why did she sign the deed of sale of May 1859, wherein she unconditionally renounces her claim of legal hypothec on that one Estate ? Then, was the time for her to object and say what she now seems anxious to state, but she did not object, in the first contract, she promised to renounce, she says, under certain conditions ; in the second she does renounce, and does not complain that the conditions which led her to promise have not been fulfilled. Apart from the considerations which lead us to be of opinion that the Plaintiff has failed to make out her case, even if the two contracts are read together, we think that by signing unconditionally the second contract, she has executed her promise, has finally renounced her right of legal mortgage on the "*Arsenal*" Estate and cannot, now, set it up again, leaving to Mr. Wiéhé all the *onus* and other charges of the contract which he seems studiously to avoid modifying.

The position of the children of Joseph Dioré, in this case, is plain, they abide by the Decision of the Court, their interest is not affected thereby.

Joseph Dioré, himself, first, suffered default, he afterwards obtained leave, by consent, to plead ; this plea was that he had nothing to say in Bar, of his wife's action, and that he admitted the facts set forth. This admission and his statement that he would not object to his wife's action are of no weight as against Wiéhé.

The action must be dismissed, with costs.

SUPREME COURT.

SÉQUESTRE.

Action en dommages et intérêts contre un gardien — Séquestre pour emploi à son usage personnel de partie des objets confiés à ses soins.

SÉQUESTRATION.

Action in damages against a sequestrator for appropriating to his own use certain articles entrusted to him.

BREARD AND WIFE,—Plaintiffs,

versus

THE CEYLON COMPANY LIMITED, Defendants.

Before :

His Honor the CHIEF JUDGE and
The Honorable MR. JUSTICE BESTEL.

E. DUPONT, —Of Counsel for Plaintiffs,
E. DUCRAY, —Plaintiff's Attorney,
S. J. DOUGLAS, —Of Counsel for Defendant,
H. BERTIN, —Defendant's Attorney.

16*th October*, 1866.

The Plaintiffs, at the date of the facts complained of in the Declaration, were proprietors of the Estate *Savannah*, of which they were subsequently deprived by a "Folle Enchère."

Whilst such owners, the Estate *Savannah* was placed under sequestration at the request of the Chartered Mercantile Bank of India, London and China. The Ceylon Company, then represented by the Honorable James Edward Arbuthnot, were appointed sequestrators of the Estate.

On the 6th February 1863, with the consent of all parties interested present in Court, it was ordered that Darné, then in charge of the Estate should continue to have the management thereof, or some other person to be chosen by the said sequestrator.

The Declaration alleges that whilst the Ceylon Company, represented as above, was sequestrator as aforesaid and whilst Darné had charge of the Estate, under the superintendence of the said James Edward Arbuthnot, as such manager of the Ceylon Company, the latter acted in the most injurious manner to the interests of the said Bréard the wife, by taking from the said Estate and appropriating to his own use articles belonging to the said Bréard the wife ; by making use, for the benefit of himself and other persons, of the property of the said Bréard the wife to her great loss and prejudice.

The said James Edw. Arbuthnot, as such manager of the Ceylon Company, is charged :

1o. With having, during the sequestration aforesaid, caused a cart with a canvass covering to be made for him on the *Savannah* Estate, from materials and labor supplied by the Estate, which cart on being made was sent by Jo : Darné, by direction of J. E. Arbuthnot, to the latter's country residence, *St. Cloud*, Plaines Wilhems.

2o. With having caused to be made, on the said sequestered Estate, some mule harness, the materials whereof were supplied by the said Estate.

3o. With having appropriated to his own use the best carriage mules of the Estate, (*viz*,) Soonia and Betizia which were never returned to Savannah estate.

4o. With having appropriated to his own use a 2nd pair of mules belonging to the said sequestered Estate, which were then in the town of Port Louis, in the Albion Dock stables, Monneron's Passage, and which are still in the possession of the said James Ed. Arbuthnot.

5o. With his having ordered Darné to cart to

his country residence St.Cloud, Plaines Wilhems in the carts and with the mules and drivers of the sequestered Estate, young plants of palm trees prepared by the laborers of the said sequestered Estate, in bamboo tubes to be planted on *Savannah* Estate, and also plantain trees taken from the orchard of the said estate.

6o. With having ordered the said Darné to manufacture in the forge of the said estate, the iron frame of a verandah, which frame was sent up to town, and adapted to the house of one Auguste Ferran, the manager of a provision store in Hospital street, Port Louis, the materials of which iron frame were supplied by the said sequestered Estate.

7o. With having directed a band of thirty men from the laborers of the said Estate to be sent to the Estate *Savinia*, District of Grand Port, there to prepare cane tops for William Hewetson the legal adviser of the Ceylon Company Limited which cane tops, to the amount of one hundred and fifty cart loads, were afterwards conveyed in the carts of *Savannah* Estate to Mahebourg, Grand Port, and thence sent over by sea to the said Estate "*L'Etoile*," at Flacq, belonging to the said William Hewetson; and the thirty men though absent from the Estate being carried nevertheless on the muster roll of the laborers of the said sequestered Estate.

8o. With having directed that a large quantity of Penang cane tops which had been prepared by men sent to *Savannah*, by the manager of the *Union Vale* Estate, Grand Port, be sent, on the demand of Hewetson, to Port Souillac at Savane, in the carts of the sequestered Estate there to be put on board a coaster and conveyed to the said Mr. Hewetson, at Flacq.

9o. With having caused to be carted with the carts of the sequestered Estate, Vacoa bags which he had caused to be purchased on his own account in the district of Savane.

The Defendants denying the several facts and things above alleged, pleaded:

1o. Absence of right or cause of action against the Defendant.

2o And a denial of having caused any damage to the Plaintiff.

The Plaintiffs contended that the Ceylon Company Limited who had appointed James. Edw. Arbuthnot for the management of their interests in the Island was responsible for the wrongs done by their manager whilst and as long as the latter was entrusted with the conduct of their affairs.

This responsibility is laid upon the Ceylon Company by Art. 1384 of the C. C., wherein it is enacted that: "On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre ou des choses que l'on a sous sa garde..... Les maîtres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés."

The wrongs complained of were caused by Arbuthnot and by his orders during the sequestration of *Savannah* Estate, entrusted to the Ceylon Company, of which Company he was then the Manager.

The duties of the sequestrator is to be found in Arts. 603 and 604 of the C. of C. Proc.

Art. 603 says: "Le Gardien ne peut se servir des choses saisies, les louer ou prêter à peine de privation des frais de garde et de dommages intérêts, au paiement desquels il sera contraignable par corps."

Art. 604: "Si les objets ont produit quelques profits ou revenus il est tenu d'en compter, même par corps."

The facts charged and proved shew that Arbuthnot was not satisfied with the use for the purposes of the seized Estate of the things seized and placed under his custody, but that he has, in point of fact, taken away from the seized Estate the best pair of carriage mules, which, according to some of the witnesses, were never returned to *Savannah*, after the sequestration had ceased. Other witnesses, it is true, have said that another pair of better mules for agricultural purposes had been sent to *Savannah*, in exchange of the carriage mules taken by Arbuthnot. But what right had Arbuthnot to make any such exchange? Another pair of mules belonging to the Estate, which were used by Bréard the husband when administrating the Estate on behalf of his wife, whilst the latter was legal owner of *Savannah*, Arbuthnot has allowed to pass into the possession of Hewetson, the Attorney of the Ceylon Company Limited, pending the sequestration. Cane tops were ordered by Arbuthnot, or with his sanction, to be cut by the men of *Savannah*, carted to Mahebourg and Souillac in the carts of the Estate, drawn by the mules of the Estate, and driven by the men of the Estate, early before commencement, or soon after completion of the crop. No less than one hundred and fifty cart-loads of cane tops were so cut by the men, carted in the carts and with the mules of the seized Estate, driven by the laborers thereof, paid by the Estate.

So carted, they were shipped and sent by water to the Estate of Hewetson, the Attorney of the Ceylon Company. The workmen and laborers of the seized Estate were employed with the knowledge and by order of Arbuthnot, either in harness or halter making; in preparing an iron frame for a verandah, subsequently put up at the store of one Augte. Ferran—under the control of Arbuthnot as such Manager as aforesaid;—in the making of a small cart, the materials of which were supplied by the Estate "*Savannah*." Banana plants and palm tree plants were ordered by Arbuthnot to be carted to his private residence; Vacoa bags purchased on Arbuthnot's private account were carted to Souillac, in the carts of the seized Estate, and yet of all this outlay in supplies of materials, men, labor, carts, mules, drivers &c., no credit has been given to the Estate to the great damage of Breard the wife and of her creditors.

In answer, the Defendants denied the several

facts above mentioned, and contended. 1*st* that in assuming the existence thereof, the "Ceylon Company" could not be answerable for the "torts" of the manager, unless they had adopted his acts which was not the case in the present instance. 2*nd* that the law between the then owners of the seized Estate *Savanah* and the Company was the Rule of Court. Had the Company swerved in any way from the obligations laid upon them by the sequestration rule, of course they might justly be held liable to repair the damages caused by their departure from that rule. Such, however, was not the case.

The Company having complied with the order of the Court, by duly supplying the Estate with all the requisites for the due administration thereof, whereby and by means of which supplies the crops of the Estate, pending sequestration, reached the large figure of 4 millions pounds of sugar, when the annual average crops of the Estate, previous to sequestration, were only from 2 to 3 millions lbs. of sugar. This increase of production was brought about with an increased expenditure, only of $\frac{1}{3}$ at the utmost, of the annual expenditure previous to sequestration. The sequestered Estate had been credited with the proceeds of this increased crop. And yet we are told that the Company has entailed considerable loss on Mrs Bréard or creditors, through her manager, James Ed. Arbuthnot, for which loss, Mrs. Bréard claims to be indemnified.

But Mrs. Bréard has had the property sold over her by "Folle Enchère," the legal effect of which is that, in law, she is supposed never to have been in possession of the Estate. She personally, therefore, can lay no claim to any balance in the hands of the Company. Her creditors might have done so, had they not been paid by a 3rd party who has been subrogated, and as such, entitled to any balance in hand.

Laying this legal point, however, aside and looking at the facts alleged in the Declaration—Darné, the manager under Arbuthnot, distinctly swears to two mules better adapted to agricultural purposes having been sent to *Savannah*, in exchange of the lighter pair of mules taken by Arbuthnot for his carriage. The second pair was given by the brother Bréard to Hewetson in payment of rent. It was true that the men and carts have been employed in carrying cane tops to Mahebourg or Souillac, but this was done under the express understanding between Darné, with the authority of Arbuthnot and Hewetson that the latter was to return to and for the use of *Savannah*, an equal number of cart loads of cane tops, which were to be cut, carted and conveyed from Flacq to Souillac or Mahebourg at the expense of Hewetson. Such return could not be made immediately because of the cane disease prevailing at Flacq, of which Darné knew nothing until such time when he visited Hewetson's canes, after delivery of the cane tops.

On seeing the disease preying on Hewetson's canes, he prudently abstained from calling upon Hewetson for an immediate performance of his contract, which Hewetson has stated upon oath in Court, he was prepared to fulfil whenever called upon by Darné to do so. The authority for that exchange of cane tops was given by Arbuthnot upon the statement of Darné that such exchange was to be profitable to the seized Estate.

The vacoa bags were carried by one or two carts of the sequestered Estate when going empty for provisions at Souillac. The manager Darné availed himself of this opportunity to forward those bags. Where is the substantial damage caused to the Estate on this as well as on the other heads? There may have been an error of judgment on the part of Arbuthnot and of Darné. There may be a legal wrong caused to Mrs. Bréard or creditors, but not that material wrong which is to warrant the Court in visiting, whether Arbuthnot as manager of the Ceylon Company or the Company itself, with the heavy damages prayed for.

The outlay made for the iron frame, the halter, the palm trees plants and banana plants, the carriage of these several trifling articles are of so small importance that the Plaintiffs have not thought fit to insist for Judgment on these several heads. I shall therefore not enlarge upon these several points.

JUDGMENT.

The "Ceylon Company" having selected and appointed Arbuthnot for its Manager, cannot but be answerable for the wrongs of the nature of those alleged here and caused by their Agent to 3rd parties, saving their recourse against their Manager to make good any loss brought upon them by any of his acts and deeds.

The only other issue raised by the demand of the Plaintiff is, whether the proceedings of the Defendants or their Manager, Arbuthnot, for whom they are responsible, have caused damage and loss to the Plaintiffs.

We have not to enquire whether the conduct of Arbuthnot has been indelicate or unseemly or unduly beneficial to himself or those whom he chose to favor, except so far as his acts have caused pecuniary loss to the Plaintiffs, for, to that their demand is confined. It may very well be, for example, that the supplies of cane tops sent by the sequestrator to Hewetson, the law agent of the "Ceylon Company," have been very beneficial to the latter and his Estate at Flacq, but as he is prepared to restore the same quantity of cane tops to *Savannah* the evidence of the witnesses leads us to suppose that the balance will stand pretty even between the Estates, and that no permanent loss will be sustained by the Estate *Savannah* and by Mr. and Mrs Bréard, had they continued in possession of that Estate. Their loss, however, of all interest in *Savannah*, is their own fault not paying their sale price; at the same time we cannot approve of the conduct of the Sequestrator in this or in the other matters set forth in the Plaintiff's statement of facts and in support of which, evidence has been adduced. It is highly laudable that planters, like other persons should be on good terms with their neighbours and mutually accommodate each other with the use of their mules and carts and the services of their employés and laborers not pressingly re-

quired for their own Estates. But the position of a sequestrator is a peculiar one. Unlike the ordinary landed proprietor who is at the head of his own affairs and performs the duties of good neighbourhood in the way he deems best, a sequestrator is a temporary officer placed, by the Court in charge of the management of a sugar Estate usually in a position of embarrassment and bound to guide the business of the important trust devolved upon him with a single eye to the interests of the Estates. He ought not to indulge in those acts of liberality which, a person disposing of his own property, is perfectly entitled to do.

It appears to us that the only part of the case which the Plaintiffs have proved by proper evidence is the statement about a cart made upon the Estate and taken away by Arbuthnot.

The Defendants have admitted their liability to make good this demand.

Upon the evidence, we consider $30 a fair price for such an article and that the Plaintiffs are entitled to recover that amount.

We, therefore, condemn the "Ceylon Company" in the sum of $30 of damages, with costs of suit.

SUPREME COURT.

VENTE D'IMMEUBLES,—FEMME MARIÉE ET NON AUTORISÉE,—FAUSSES QUALITÉS,—ACTION EN NULLITÉ DE LA VENTE,—TIERS DÉTENTEUR DE BONNE FOI.

La qualité de veuve faussement prise par une femme mariée et non autorisée, dans un contrat de vente, permet au mari ou aux héritiers de la femme de demander la nullité de la vente. Le tiers détenteur de bonne foi ne peut s'opposer à cette demande qu'en prouvant qu'il y a eu fraude de la part de la femme.

SALE OF IMMOVEABLE PROPERTY, — MARRIED WOMAN ACTING WITHOUT AUTHORIZATION,—CAPACITY WRONGFULLY ASSUMED,—ACTION IN NULLITY OF THE SALE,—THIRD HOLDERS BEING OF GOOD FAITH.

The capacity of widow wrongfully assumed in a deed of sale by a married woman acting without authorization entitles the husband or the heirs of the wife to claim the nullity of such sale.

The third holder who alleges his good faith cannot oppose the demand except when he proves that the wife acted fraudulently.

A. PELLETIER,—Plaintiff,

Versus

STANDLEY & AUDIBERT & ors.—Defendants.

Before:

The Honorable Mr. JUSTICE BESTEL, and
The Honorable Mr. JUSTICE COLIN.

W. NEWTON, —Of Counsel for A. Pelletier.
E. MACQUET, —Attorney for the same.
L. ROUILLARD,—Of Counsel for Standley & Audibert.
E. DUCRAY, —Attorney for the same.
G. GUIBERT, —Of Counsel for Wid. Drenning.
V. DUCRAY, —Attorney for the same.
E PELLEREAU, —Of Counsel for Widow Hodoul.
A. PERROT, —Attorney for the same.

6th September 1866.

The Plaintiff, Achille Pelletier, claiming to hold the rights of the Widow Edme Barthélemy Hodoul, sole heiress of her mother, F. B. M. F. Jorre St. Jorre and of her late father J. Joseph Marie M. Jouan, set forth in his Declaration, that: On the 31st October last, he became the owner, by way of barter and purchase from the said Widow Hodoul, of a plot of ground 150 French acres in extent and situate in the District of Pamplemousses, at the place called "l'Arsenal." The Declaration after describing the boundaries, and tracing up the ownership of the said land to Dioré and wife, alleged that the Defendants William Standley and Jean Audibert were unduly enjoying and squatting upon 4 acres and 22 perches or thereabouts, the same being part and parcel of the above plot of ground, and although requested, have refused to surrender the same. Wherefore the Plaintiff brought this action for a declaration of right, to the effect that the Court should adjuge the said 4 acres and 22 perches thus held by the Defendants, to be the Plaintiff's property, and should order the Defendants, forthwith, to deliver up the same to him. The Defendants pleaded in substance, that the plot of ground was not properly described. (This was amended, by order of the Court.) They further pleaded that the Plaintiff did not hold better rights than the vendor to him, *viz*: Widow Hodoul. That the said Widow Hodoul having accepted unconditionally her late mother's succession, took up that succession, with all its charges and encumbrances. That the Plaintiff was no more entitled to bring this action than Mad. Hodoul, herself. That the said Madame Jouan, the mother of Mme Hodoul, when she purchased the land in question from Dioré and wife, bought the same publicly as the Widow of Mr. Jouan, who was not then dead, but was living in a Lunatic Asylum at Grand River; and again, when the said Madame Jouan sold a portion of the land, by her purchased from Dioré, to Lailvaux and wife, she, again, fraudulently described herself as the widow of the still living husband. That her daughter, Mad. Hodoul, and the Plaintiff who holds under Mad. Hodoul, cannot set up Mad. Jouan's fraud, so as to dispossess the "*bona fide*" holders.

The principal Defendants who had bought the 4 acres and 22 perches in question, on the 15th January 1864, from one Augustine Pelletier, then the wife, and now the Widow of Henry Drenning, brought, against that lady, their action in warranty, to be indemnified from any loss which they might suffer in case they were ejected from the 4 acres in question.

The Widow Drenning's Plea, after denying the

right of Standlye and Audibert to sue her, was in subtance but the echo of the Plea of the several Defendants. The Widow Hodoul, vendor to the principal Plaintiff, Achille Pelletier, of 150 acres of land, within which are included the 4 acres and 22 perches which are the subject matter of this suit, intervened to support her rights and those of the purchaser from her.

W. NEWTON, for A. Pelletier, laid the facts before the Court, and argued that Standley and Audibert, who, through two or three parties, held from Mad: Jouan, held under a bad title, as Mad. Jouan was married when she sold, and as she sold without being authorized by her husband or by Justice, the sale was null. Art: 223 CODE CIVIL.

DEMOLOMBE, IV, page 421.
MOURLON, I, page 413.

Jurisp: Générale.—"Autorisation de la femme mariée."

E. PELLEREAU, for Mad. Hodoul, took the same side: Jouan and wife were under the community of goods. Jouan was interdicted, his property could only be sold as minor's property. Art: 509 CODE CIVIL, also: ZACHARIÆ I, page 244.

L. ROUILLARD, for Standley and Audibert, and G. GUIBERT, for Widow Drenning, argued: That the fraud of Mad. Jouan who sold as a Widow, when she was not, made all the difference. Mad. Hodoul, her daughter, has accepted her succession, and therefore is barred, as she would have been barred, from challenging a sale made by herself; the Plaintiff has no more right than she has. The Court has to weigh the circumstances of the case; Mad. H doul, as heiress of her mother, is bound to guarantee that contract which, as heiress of her father, she seeks to annul. They cited:

MARCADÉ, 1. Art. 225.
S. V. 54—2—504.

NEWTON, in reply, contended that the law distinctly gave the right of challenging such sales to the husband, nay, to the wife herself and to the heirs of both.

JUDGMENT.

The facts are sufficiently clear from the pleadings divested of their technicalities, and reduced to the plain averments which they contain. Mad. Jouan, it appears, during her husband's life time, and when the latter was an inmate of the Grand River lunatic Asylum, bought, on May 10th 1833, from Jean François Dioré and wife, 150 acres of land, situate at "Arsenal." She purchased as the Widow Jouan, née St. Jorre. A short time after, she sold, through one Raymond Monvoisin to Jean Baptiste Lailvaux, four acres or thereabouts, parcelled out of the 150 acres bought from Dioré and wife. It would appear that Wm. Standley and Jean Audibert, the present occupiers of the 4 acres in question, hold from Drenning and wife, who, themselves, held through several proprietors, from Lailvaux. This point is not clearly made out by the evidence, but the arguments of Counsel admitted that Drenning and wife held, in the manner described, from Lailvaux, and a certificate from the Conservator of Mortgages shows that there were no hypotheques taken on that portion of land, so that Standley and Audibert paid the Drennings.

The principal Plaintiff, A. Pelletier, also holds from Made. Jouan, through her daughter Made. Hodoul, and he now seeks to eject Standley and Audibert, because, he says, and Made. Hodoul says with him, that Standley and Audibert hold under a title, null and void *ab initio*, as Made. Jouan could never have sold without the authorization of her husband or of Justice; nay, her husband being at the time a lunatic and interdicted, the real property could not have been legally sold except as minor's real property is directed to be sold.

Prima facie, the title of Standley and Audibert is absolutely bad, and as sufficient time of occupation has not run (Jouan, died not long ago,) to cure, by prescription, its original taint, as Art. 225 is precise, and gives not only to the husband, but to the wife herself, and to their heirs, the right of challenging a sale of real property made by the wife, during her coverture, without authorization, it is plain that although the sale may be a hard one for the present occupiers of the land, their title is null and void, if the facts cannot help them.

They urge that the facts do help them, as besides, that as heirs of her mother, Mad. Hodoul would be bound to guarantee, and therefore is barred.

What would become of the Article distinctly giving to the wife's heir the right of challenging the sale, if whilst challenging as heir the challenger were barred?

The Article is peremptory; whilst the minor, heir to his guardian who has sold the joint-real Estate of himself and ward, without fulfilling the legal formalities, has been held not to be able to challenge, the wife may challenge, and the wife's heir may challenge, and why? Because the above cited article clearly enacts that right in favour of the wife, of her husband, of her heirs, whilst it has been held (*Pechambert vs. Gax* S. V. 40 1-569,) that the fact of the minor being heir to his guardian barred his action under the rule "*quem* "*de evictione tenet actio, enundum agentem repellet* "*exceptio.*" We find no where, nor has any case been cited to us, on that point, that the same rule has been extended to married women and their heirs, when they seek to challenge contracts made by such married women without the authorization of the husband or of the Judge. The reason is plain: Art. 225 gives them a right, and gives it exclusively to the persons named in its provisions.

"La démence du mari" says TOULLIER, 11, No. 1343 and following; POTHIER, "de la Puissance Maritale, No. 25," "ne lui faisant perdre "aucun de ses droits, il conserve la puissance "maritale, il en perd seulement l'exercice: La "femme demeure toujours sous sa puissance. A "défaut de l'autorisation qu'il ne peut lui don-

" ner, elle doit, au besoin, avoir recours à celle de " la Justice."

It is the duty of the parties who contract with a woman, to ascertain whether she be a *feme sole* or a *feme covert*, it is the duty of those who contract with a woman who describes herself as a widow, to ascertain whether she be a widow, and if they do not, they may, indeed, run very great risk.

But when the woman has stated that she is a widow, is that misstatement sufficient to take away from her husband and her own heirs the right thus exceptionally, but so distinctly given to them by Article 225? That, in reality, is exactly the point on which the case must turn, it was natural to expect that the Courts and luminaries of the Law, in France, should notice such a contingency, for, few must be the cases that would arise without this contingency or a similar one. It has been almost universally held that this does not suffice, unless accompanied by other facts indicative of intended fraud. DEMOLOMBE IV. No. 327 says: That a misstatement of the kind " ne saurait suffire pour effacer la nullité de " ses actes. Toutes les incapacités seraient, sans " cela, illusoires." The Court of Dijon in *Charbonnier vs. Barrault Roux*, (S.V. 54-2-504) lays down the law in very clear terms. "Considérant que l'in- " capacité, pour la femme mariée, de contracter " et de s'obliger, sans l'autorisation de son mari " ou de Justice; est d'ordre public, que la femme " dont l'état primitif de femme mariée est incon- " testé dans la cause, ne peut être relevée de son " incapacité légale que par la survenance de l'état " de viduité; que ce nouvel état ne peut non plus " résulter légalement de simples déclarations de " la femme, mais seulement d'un acte authenti- " que constatant le décès du mari, etc., confirme." The same opinion is again laid down by the Supreme Court of France. (S.V. 37-1-909). POTHIER Nos 53, 54, is of the same opinion. TOULLIER II No. 622. distinctly writes: " si la femme prenait, " en contractant, la qualité de fille majeure, de " femme divorcée ou de veuve, le contract n'en " serait pas moins nul, autrement ce serait ouvrir " une voie pour éluder la loi. Celui qui a contracté " avec une femme doit s'imputer de n'avoir pas " connu son état. "

In fact, all the opinions we have been able to consult, agree with the law as laid down above, save one, MARCADÉ who, whilst admitting the law for the minors, because " le seul aspect de sa " figure doit me donner des soupçons de son in- " capacité," would find a distinction as to the wife, because: " Je ne puis lire sur son visage " qu'elle est mariée, et je ne puis pas lui deman- " der un acte qui constate qu'elle ne l'est pas, " enfin elle comprend la gravité du mensonge " qu'elle fait dans l'acte." Reasons, save the moral weight of last,—and there are so very many serious grounds for requiring the authorization of the husband or that of Justice, that, this alone cannot outweigh them,—is certainly not satisfactory, above all when we remember that Article 225 is framed specially for married women, and that, except in a few particular cases, nothing can be more easy than to get from a woman, who contracts as a widow, the proof of her husband's demise.

There is a case when most authors hold, and we agree with them, that a married woman is estopped, and her heirs are estopped also: it is when, besides her simple statement that she is a widow she has used fraudulent manœuvres to give colour to that statement, such as producing a false act of Death; this would amount to a *delictum or quasi delictum*, and the principle enacted against minors, in Art: 1310 of the CODE, should also be applied to the married woman. But in the case before us, we have no such circumstances, nothing beyond the mere statement.

There is one circumstance which, considering the very meagre facts that have been laid before us, tends the other way: In the deed of sale of the 4 acres to Lailvaux, she, Mad. Jouan, does not appear personally, it is Raymond Monvoisin who sells in her name, acting under a Power of Attorney which is annexed, and when we turn to the Power of Attorney, we do not find that Mad. Jouan describes herself as a Widow; on the contrary, she calls herself " femme Jouan, née St. Jorre." Surely, that Power of Attorney ought to have induced the purchaser to examine whether the designation of Widow in the deed of sale from Dioré to Mad. Jouan,—a deed of sale which, it may be, he never looked at at all,—was a reality or a mistake. We have tried to find whether these were facts in the cause which could lead us to bring this case under the rule " *communis error facit jus*;" a rule which would apply to a case like this, and in the opinion of the Authors, might defeat the married woman's endeavour to set aside the contract. But the Defendants show no facts tending to prove that Mad. Jouan was commonly believed to be a Widow, and that the purchaser's negligence might thereby be excused; Jouan was interdicted in Mauritius; his wife was his guardian in Mauritius; the land which gives rise to this suit is at Mauritius, and the contracts touching the same were made in Mauritius; the only evidence before us, the personal answers of Mad. Hodoul, negatives the notion of there having been " *communis error*." She often visited her father at the Grand River Lunatic Assylum. The other fact brought out is of a domestic nature and does not help the case one way or the other.

Standley and Audibert have paid Mrs. Drenning, and effect must be given to their claim of warranty against that lady. We have no other parties before us, and indeed, we have not had laid before the Court the several deeds of conveyance from Lailvaux or to Mrs. Drenning. If the force of the law, viewed by its own light and by the light of the Decisions and Authorities we have consulted, leaves not much doubt in our minds as to what must be our Decision on the merits, still, there is no doubt that the mischief that has been done is partly, at least, to be attributed to the misstatement made by Mad: Jouan styled a Widow, in the deed of sale from Dioré to her; and the Plaintiff is but the " ayant droit" of Mad: Jouan.

We must declare that the four acres and 22 perches of land in question do form part of the 150 acres which Mad. Hodoul held as heiress of her late father and mother; that William Standley

and Jean Audibert have no right to the same and must surrender the same.

We hold that the Widow Drenning must pay back to William Standley and Jean Audibert the sum of $1,800, the purchase price of the said portion of land.

We have no evidence to show that a further sum of $300 is due to them for a well which they made on the said piece of land.

We give the principal Plaintiff, holder of Mad. Hodoul's rights, no costs, nor is Mad: Hodoul entitled, in our opinion, to any.

We think that Standley and Audibert should have thair costs as against Mrs. Widow Drenning, for their well grounded action in warranty.

SUPREME COURT.

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OUVERTURE DE CRÉDIT,—AVANCES FAITES A UNE PROPRIÉTÉ SUCRIÈRE,—BALANCE DE COMPTE,—SAISIE IMMOBILIÈRE,—C. C. 2213,—C. C. P. 551,—RULES OF COURT, NOS. 54, 152.

Jugé que la Balance provenant d'une Ouverture de Crédit, certifiée par la signature de la partie faisant les dites avances, n'était pas un titre suffisant pour autoriser la saisie de l'immeuble au profit duquel les avances étaient faites.

Principalement une clause du contrat règlant le mode à suivre pour arriver à l'établissement de la balance annuelle n'ayant pas été suivie, et ce mode étant par lui-même insuffisant pour fixer et établir une balance précise capable de motiver une saisie Immobilière.

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"OUVERTURE DE CRÉDIT,"—ADVANCES TO A SUGAR ESTATE,—STRIKING A BALANCE,—SEIZURE OF A LANDED ESTATE.—C. C. ART. 2213,—C. C. P. ART. 551,—RULES OF COURT NOS. 54, 152.

A Balance struck, under an "Ouverture de Crédit," by the signature of the party who had made the advances, was not held a sufficient title to seize the Estate.

A clause in the contract regulating the mode of ascertaining the balance annually, not having been observed every year, and being in itself ineffectual to fix and liquidate a precise balance, such as must precede a real seizure.

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THE CEYLON COMPANY LIMITED,
Appellant.

Versus

WIDOW PRUDHOMME,—Respondent.

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Before:
His Honor the CHIEF JUDGE and
The Honorable Mr. JUSTICE BESTEL.

S. J. DOUGLAS, —Of Counsel for Appellants.
W. HEWETSON, —Attorney for the same.
G. GUIBERT, —Of Counsel for Respondent.
F. ROBERT, —Attorney for the same.

—

28th September, 1866.

This was an Appeal from a Judgment of the Master, setting aside as null and void a seizure by the Appellants, of the Respondent's Estate *Bon Accueil*.

It appeared that the Ceylon Company, on the 18th December 1863, granted an "Ouverture de crédit" in favor of Mrs. Prudhomme, for the working of the Estate. The sum of $38,000 was to be advanced for the first year and that of $40,000 for each of the two subsequent crops. The sugars, as is usual in such arrangements, were to be handed to the Company, and their value put to Mrs. Prudhomme's credit. By Article 7 of the deed it was stipulated: "Le ré-"glement définitif devra avoir lieu entre parties "et le compte courant balancé, au plus tard, le "dix février de chaque année, et toute balance "due a cette époque sera payée comptant par "celui qui en sera débiteur."

"Cette balance sera suffisamment déterminée "par l'arrêté que fera l'Honorable Arbuthnot, "du sus dit compte sauf à Madame Veuve Prud-"homme Duhancourt à relever ultérieurement "toutes erreurs qui pourraient y exister."

It appeared that there had never been any settlement of accounts in the way contemplated in this article. In point of fact no accounts were ever rendered to Mrs Prudhomme, probably from the balance being always supposed to be against her, but on the 12th February 1866, a Notice previous to levy was served upon her by the Company, for the sum of $37,000 odds, alleged to be the balance due at that time, according to an account subscribed by the Manager of the Company. On the 15th March the conditions of sale were read and parties being heard before the Master, on the validity of the proceedings, he declared the seizure null and void on the ground that the title on which it was based was not clear, absolute and determined.

In the Appeal, the Company maintained three points. *Firstly*: That under Rule 142 of Court the objection by Mrs. Prudhomme was too late., *Secondly*: That a "saisie" must be held to be an action in the sense of Article 34 of the Rules of Court and that a tender of papers was made here, in the ordinary way, which was all the Appellants had to do. *Thirdly*, on the merits: That the title was quite sufficient to support the seizure, as parties had made a contract for themselves that a "Réglement définitif" should annually be made between them and that the balance should be ascertained by the signature of Arbuthnot, the Manager of the Company.

The Appellants relied on the following authorities: CARRÉ and CHAUVEAU, Vol. V, page 416, No. 298 (5); Rules and Orders of Court, Nos. 54 and 142.

G. GUIBERT, for Mrs. Prudhomme *contra*, maintained: That the Rule of Court No. 54 had nothing to do with the question; That Rule No. 142 applied solely to nullities *in Procedure*, not to objections which were fundamental and struck at the title or basis of the seizure itself. *Thirdly*: That the title, here relied upon, was neither authentic nor executory and not for a sum "certaine and liquide" in the sense of Article 2213 of the Civil Code. C.C. 2213—C. Civil Procedure, Article 551—Carré and Chauveau V. 5, Page 415, No. 2119.

JUDGMENT.

We do not think that the Rules of Court relied on by the Appellants here will support their Appeal. No. 54 of those Rules is applicable to "actions and incidental proceedings" and not to executions like the seizure of a landed Estate, which Rule No. 142 cannot, in our opinion, prevent the statement of a plea which touches directly the very foundation of the proceedings, although it is admitted that the plea was not advanced within a certain time before the reading of the conditions of the sale. It would not be easy to see how a Rule of Court could have so sweeping an effect; besides, the terms of the Rule apply much more naturally to errors in title or substance. We cannot therefore sustain the two formal objections stated on behalf of the Appellants.

On the merits, we find by Article 2,215 of the CIVIL CODE that, to enable a creditor to seize the immoveable property of his debtor, he must be armed with a formal title, ready for execution, clearly showing that a fixed and determined amount is due. The words of the Law are these: (Art. 2,213) "La vente forcée des immeubles "ne peut être poursuivie qu'en vertu d'un titre "authentique et éxécutoire pour une dette cer- "taine et liquide. Si la dette est en espèces non- "liquidées la poursuite est valable; mais l'adju- "dication ne pourra être faite qu'après la liqui- "dation."

In the present case we have not got any formal notarial deed ready for execution and clearly ascertaining and defining the amount due to the "Ceylon Company." But farther, it has been decided, under this article of the Law, that the arrangement which here passed between the parties, called an "Ouverture de Crédit," is not such a writing as will sustain a seizure of the debtor's Estate, excepting in those cases where there has been a balance struck between the parties, and where a clear and definite sum remains due to the party who made the advances. *Orleans*, 9th January 1849, quoted and approved of by DALLOZ. Repertoire, "Vente publique d'immeubles," art. 217. "Il a été jugé qu'une Ouver- "ture de Crédit ne peut constituer une créance "liquide et certaine, de nature à servir de base à "une saisie immobilière, qu'autant qu'elle a été "suivie d'un arrêt de compte, établissent que le "crédité en a fait usage, et qu'il reste débiteur "d'une somme déterminée." We cannot find any such *arrêté de compte* in the present case.

We must, next, enquire if the special contract of the parties is such as to supersede the necessity of producing the clear, liquid and determinate title which the Law usually requires.

It was argued that the parties might make any arrangement they pleased for the ascertainment of the debt due on one side or the other, and as no question of public Policy is involved in such private deeds, Mrs. Prudhomme might legally bind herself to accept a balance merely certified by the Manager of the "Ceylon Company" which had engaged itself to make her such large advances of hard cash. Now, this argument undoubtedly carries with it a certain amount of plausibility and force. But there are two considerations which, we think, must prevent it from being successful here. In the *first* place, the Article, itself, was not observed and carried into execution by the parties. No annual settlement of any kind, either definitive or provisional, took place between them, and no statement was ever rendered to Mrs. Prudhomme of how the account between her and the Company really stood. It is not till more than two years after the commencement of the contract, that any statement is furnished to the Respondent of how she stands, and she is, at once, served with a *Commandement* or Notice to pay, immediately followed up by an actual seizure of her Estate. We do not think that the conditions of the article of the contract have been observed, and therefore it cannot be invoked to support the present proceedings. But, again, even if this Article, which is plainly of a kind which a Court of Law would interpret very rigourously against the Company, had been strictly observed, it cannot, we think, be held to be such a title, as the law requires for the seizure of the debtor's Estate, *i.e.* for taking proceedings against him, of the most serious nature. The balance pointed at is a "*Réglement definitif*" only in name not in reality, for, Mrs. Prudhomme is not to be finally bound by the statement of the Manager of the "Ceylon Company," but reserves to herself a right to point out all errors that may exist in it. It would therefore only be a provisional settlement at the best, and such a title, in terms of the strict Rule of the Code which has been quoted above, would not support a seizure of the alleged debtor's immoveable property, for, the existence of the debt in a determined and liquid form has not been ascertained.

The Judgment of the Master is affirmed and the Appeal is dismissed, with costs.

COURT OF BANKRUPTCY.

FAILLITE—CERTIFICAT DE 3ME. CLASSE—ORD. No. 33 DE 1853.

BANKRUPTCY—3RD CLASS CERTIFICATE AWARDED —ORD. NO. 33 OF 1853.

FRANÇOIS AYAVOU,—Petitioner.

Before:

His Honor THE CHIEF JUDGE, Commissioner.

C. CAMPBELL,—Of Counsel for Petitioner.
F. GILOT, —Attorney for the same.
G. GUIBERT, —Of Counsel for Opp. Creditor.
A. PISTON, —Attorney for the same.

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1*st October*, 1866.

THE COURT.

The Certificate is opposed on two grounds: *viz*: that the Bankrupt carried on his trade since he commenced business in 1855, in a most careless and negligent manner, never having made up any inventory or ascertained what his position really was, and secondly that when he carried thro' an arrangement with his creditors, in 1861, he inserted in his balance sheet two immoveable properties valued at upwards of $7,000, and merely added in a note that mortgages existed upon them but much under their value. That, in truth, he had previously sold the properties under a right of "Réméré" or power of redemption within two years. That he never informed his creditors of the real state of matters, and the period of redemption was allowed to expire and the subjects were lost to the Estate, and little or nothing has been paid to any of the creditors.

To these charges of misconduct on the part of the Petitioner, it has been answered that he is an ignorant Indian, not conversant with the rules of trading. That he produced with his balance sheets the deeds of sale of the properties, with a right to redeem, within a certain time, and creditors have themselves to blame if they never were at the trouble of looking at the papers and never took any steps for working out the arrangement which they accepted. The Petitioner further says: That in terms of the arrangement, he had made certain payments to some of his creditors, to account of the debts due to them. The debts as now due by the Petitioner are stated at $7,691 56 c. in his Balance sheet and the real available assets are so small that the creditors will receive almost nothing.

Altho' it appears to me that the creditors have been very far, indeed, from looking well after their own interests, I do not think that the Bankrupt is free from blame. The Creditors ought, assuredly, to have seen that the agreement was properly carried out, but in this case as in many others, notwithstanding the many warnings which the Court has given to creditors, that a strict supervision ought to be exercised over persons who are under arrangements, no one was named to see that the arrangement was duly worked. The Bankrupt appears to have been allowed to do just what he pleased. He has paid off but little of his outstanding obligations and has been permitted to add largely to his responsibilities. But, on the other hand, it is but too clear that he never brought the actual position of his affairs and particularly that of his available property fully and frankly before his creditors. Indeed, he never took the necessary steps to ascertain for himself how he really stood; he never made an inventory nor struck a balance. It must be admitted, at the very least, that his statements on his former application were calculated to mislead his creditors, and subsequently he went on incurring fresh debts without even letting his creditors know what he was about or what the state of his affairs was, tho' they had consented to give him time to pay his debts.

His conduct was such that the Court can only award him a certificate of the 3rd Class, which is hereby allowed.

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COURT OF BANKRUPTCY.

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FAILLITE,—PROTECTION ET CERTIFICAT REFUSÉS, —ORD. No. 33 DE 1853.

Circonstances dans lesquelles le Certificat fut refusé "hoc statu" et la protection retirée au failli, avec permission de renouveler sa demande lorsqu'il jugerait opportun de le faire.

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BANKRUPTCY, — CERTIFICATE, — PROTECTION WITHDRAWN,—ORD. No. 33 OF 1853.

Circumstances in which the Certificate was refused "hoc statu" and protection was withdrawn, with leave to the Bankrupt to renew his application if so advised.

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J. EDOUARD SÉNÈQUE,—Petitioner.

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Before:

His Honor the CHIEF JUDGE, *Commissioner*.

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S. J. DOUGLAS,—Of Counsel for Petitioner.
A. J. COLIN, —Attorney for the same.
HON. V. NAZ, —Of Counsel for opposing Creditor.
H. BERTIN, —Attorney for the same.

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1*st October*, 1866.

The Petitioner in this case has stated in his examinations that he was a Miller at BLACK RIVER, some 15 miles from town, for a period of about seven months previous to his Bankruptcy. He ascribes his failure to the losses occasioned by the depreciation in value of a quantity of wheat imprudently purchased at a high figure by his partner and resold at a loss; and a damage sustained by a small vessel "Chasse Marée" which plied between Port-Louis and Black River, thro' the mismanagement of the crew.

It is said that the vessel was much injured and a quantity of rice, on board, seriously injured.

But those losses would go but a very short way to account for the deficit which appears in the funds of the Bankrupt. His debts amount to upwards of $8,000.

The assets, now available for the General creditors, will produce but a very small dividend.

The certificate is opposed by the Assignees and by one of the creditors. They challenge the *bona fides* of the Bankrupt when he alleges, *firstly*: That his daughter, a young girl living in family with him, has advanced to him, out of her own funds, the sum of $1,100 odds, to pay off a mortgage on part of his immoveable property, to which she was subrogated in room and place of the original creditor. *Secondly*: That she has bought the share of a sister, whose husband is insolvent, in the succession of their mother, for $500; and *thirdly*: That she has bought the share of a brother, for another sum of $500 cash.

The Bankrupt states that she has never been in trade but made the money by sewing and other little work, and placing her earnings in a distillery, but he has adduced no evidence in support of these allegations. I shall say nothing more of these matters in the present Judgment, as it is probable that some of them, at least, will become the subject of Judicial inquiry, in another form.

It has been shewn that the Petitioner, on the 25th November of last year, subscribed a formal notarial deed, consenting to a mortgage over his property, for the sum of $3,875, in favour of one of his creditors, Mr. Bremon. This security is now held by the opposing creditor, Bayon. In that deed the Petitioner declares as follows: "Déclare Monsieur Sénéque que l'immeuble pre- "sentement hypothequé n'est grevé que d'une "inscription de trois mille piastres pour le cau- "tionnement de M. Nunn comme huissier."

"Déclare encore, M. Sénéque, qu'il n'a été ma- "rié qu'à Madame Louise Loumeau, decédée, et "qu'il a été tuteur des enfants issus de son mar- "riage dont deux sont majeurs et interviendront "ci-aprés, et trois sont encore mineurs; mais "qu'il n'a jamais rien reçu pour eux et ne leur "doit rien."

It appears that only 5 days before this deed was executed, *viz*: on the 20th November 1865, the Petitioner had taken steps before another Notary, not only in his personal character as surviving member of the community between him and his late wife, but as the legal tutor of his 3 minor children, to make up an inventory "par commune renommée" of the goods belonging to the succession of the community as well as to the succession of his deceased spouse.

Where the truth lies as to the real position of the Bankrupt, in relation to his minor children, it is unnecessary to inquire at the present moment, as the facts will be ascertained in the proceedings which the creditor will be necessitated to bring to vindicate his legal rights under the mortgage, but it is plain that it will be very different, if not impossible, to reconcile the two statements made in authentic deeds by the Petitioner.

It has been pleaded for him that the inconsistences, apparently so glaring between the statements in the two documents in question, do not arise in matters connected with his trade, and that the Court must confine itself to inquiry into "his character as a trader." But this excuse cannot be accepted, for, the mortgage given to Mr. Brémon, was for a trade debt and the conduct of the Bankrupt has rendered it necessary for the now holder of the security to take proceedings for setting aside the alleged inventory, otherwise his security, if not altogether compromised, will be seriously affected.

No certificate can be granted at present. It is refused *hoc statu*, with leave to the Petitioner to apply again when he shall be so advised. Protection, in the meantime, withdrawn.

SUPREME COURT.

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SUCCESSION,—HERITIERS ABSENTS,—ENVOI EN POSSESSION,—TITRES,—ACTES DE NOTORIÉTÉ.

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SUCCESSION,—ABSENT HEIRS,—MOTION TO BE SENT IN POSSESSION,—TITLE DEEDS,—ACTS OF NOTORIETY.

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HEIRS REIGNIER,—Plaintiffs,

Versus

CURATOR OF VACANT ESTATES, Defendant.

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Before:

His Honor the CHIEF JUDGE, and
His Honor Mr. JUSTICE G. BESTEL.

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E. LECLÉZIO, junr., —Of Counsel for Plaintiffs.
GEO. TESSIER, —Plaintiffs' Attorney.
EUG. LECLÉZIO, sen. } Of Counsel for Defendant
} Defendant's Attorney.

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16*th October*, 1866.

THE COURT.

There is considerable complication in this case, arising from the lapse of time since the death of the *de cujus* Jean Baptiste Reignier, in 1802; the numerous persons in France who claim to be his heirs, amounting altogether to no fewer than 48 in number, the want of formal acts of marriage, births and deaths, and the conveyance of their rights by some of the alleged heirs to third parties who are not represented in the present proceedings.

As at present advised, and subject to any change of our views, after hearing the farther explanations of parties, we think:

1st. That the funds in the hands of the Curator, subject to the payment of his proper costs,

are the property of all the heirs of the said deceased Jean Baptiste Reignier, whosoever those heirs may be, and not of such of those heirs alone, as were represented in the Colony, by André Maure.

2ndly. That in the absence of more formal evidence, looking at the peculiar circumstances occurring here, we are disposed to admit the acts of notoriety produced as sufficient proof of the alleged descents of the various claimants, subject to those explanations. (1) That the claimant J. E. B. Maurin must prove, by regular evidence, that he is the legal guardian of P. A. P. Reignier, before he can draw his share. (2) Claire Allemand, as alleged guardian of her minor children, must do the same. (3) And so must François Derby, as alleged guardian of Rose Allemand, said to be under interdiction. (4) Marie Antoinette Martel will require to send authority, before her share can be paid.

3rdly. That as regards the person who joined in the power of Attorney to J. B. D. Joubert, in 1816, (transferred to Maure, in 1824) or their heirs, they cannot receive payment of their shares so far at least as they transferred their rights to Rougon and Joubert, without calling those persons or their heirs into the field. There seems to be no legal evidence who the persons giving the power to Joubert were. The act of procedure referred to cannot be admitted to prove this, particularly as better evidence must, in all probability, exist and ought to be produced.

4thly. So far as regards the branch *Tron*, they do not appear to be represented by any one in the Colony, and therefore, in any view, no payment can be made to them, at present.

SUPREME COURT.

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TRANSPORT DE LOYERS,— BAIL,—SAISIE ARRÊT PAR UN CRÉANCIER HYPOTHÉCAIRE,—TRANSCRIPTION,—ORD. No. 35 DE 1863.

Le propriétaire d'un immeuble emprunta une somme d'argent, transferrant, en garantie, au prêteur, des loyers à échoir et à recevoir en vertu d'un bail fait du dit immeuble, lequel bail, à cette époque, restait à courir pour l'espace de 21 *mois.*

De plus et comme condition essentielle de cet arrangement, il fut stipulé que si les loyers ou partie d'iceux n'étaient pas payés au prêteur, ce dernier aurait le droit de détenir l'immeuble, à titre de locataire, pendant l'espace de 3 *ans, ou jusqu'à ce que le prêt fut entièrement soldé.*

Les Contrats ne furent pas transcrits.

La Cour décida sur la question touchant le créancier hypothécaire et après la saisie de l'immeuble:

Qu'il était inutile de se prononcer, quant à la validité du transport de loyers, pour un terme excédant 2 *mois, la Déclaration limitant sa demande à cette durée;*

Que la clause accordant un bail au prêteur, seulement pendant l'espace de 3 *années, était valable contre les tiers, même sans transcription.*

—

ASSIGNMENT OF RENTS AND OF LEASES,—TRANSCRIPTION,—ATTACHMENT BY A MORTGAGE CREDITOR,—ORD. No. 35 OF 1863.

A person lent a sum of money to the proprietor of an immoveable subject in Port Louis, receiving in security an assignment of rents under a lease, which at the time, had 21 *months to run.*

It was farther declared an essential condition of the arrangement that, if the rents, or any part of them, were not paid to the lender, the latter should be entitled to hold the subject, as tenant, for 3 *years, or till the lease was fully paid up.*

The deeds were not transcribed.

Held by the Court, in a question with a mortgage creditor, and after a seizure of the subject:

That it was unnecessary to decide, as to the validity of the assignment of rents, for any term beyond 2 *months, as no more was asked in the Declaration;*

That the clause as to granting a lease to the lender, as it was to endure only for 3 *years, was effectual against third parties, without transcription.*

—

F. BOUFFÉ,—Plaintiff,

versus

A. BARBIER & Co. and Ors.,—Defendants.

—

Before:

His Honor the CHIEF JUDGE and
His Honor Mr. JUSTICE BESTEL.

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J. L. COLIN ,—Of Counsel for Plaintiff.
G. A. RITTER,—Plaintiff's Attorney.
HON. V. NAZ, —Of Counsel for Defendant.
H. BERTIN ,—Defendant's Attorney.

—

6th September 1866.

On the 25th November 1864, Mr. Philippe Gaston Martin Moncamp, proprietor of a large warehousing establishment, in Port Louis, known by the name of the "Etablissement Bretonnache," let a part of it, for the term of twenty-one months, to Messrs. Barbier & Co., at the monthly rent of $300.

On the 5th October, 1864, Mr. Floris Bouffé advanced to Mr. Moncamp a sum of $5,807 75c. corresponding in amount with the rent at that

date payable for the remainder of the lease, under deduction of interest.

In security of this advance Mr. Martin Moncamp assigned to Mr. Bouffé the price or rent of the lease made to Barbier and Co., so far as due, commencing at the 1st December 1864. It was stipulated that Bouffé should be entitled to payment of the rent "directement" from Barbier & Co., and should deal with the rent "comme chose lui appartenant," being placed and subrogated "dans tous les droits et actions résultant du dit bail."

To this assignment Mr. Alfred Barbier intervened as the responsible Manager of the firm Barbier & Co., and declared that he was satisfied with it as well and duly intimated to him and that he had no attachment in his hands, or any other impediment to its receiving effect. Barbier further declared: "qu'il reconnait pour "sincère et véritable le bail ci-dessus relaté, et "qu'il s'oblige en consequence à payer, chaque "mois, à M. Floris Bouffé, directement, le prix "mensuel de ce bail"

On the same day, *viz*: on 5th December 1864, Mr. Moncamp declared in a writing formally deposited with a Notary, of the same date, "comme condition essentielle du transport fait "par lui à M. Bouffé, par acte de Me Pelte, "Notaire, en date de ce jour, du prix du bail de "partie de l'immeuble "Bretonnache" loué à "MM. A. Barbier & Cie., que, si pour une cause "quelconque MM. A. Barbier & Cie venaient à "ne pas payer tout ou partie des loyers trans-"portés, ou, si mieux il n'aime, s'adresser au "cédant personellement, de garder, à titre de "bail a loyer, la portion ci dessus décrite de l'im-"meuble loué a Messrs. A. Barbier & Co.

"Dans ce cas, ce bail ne devra pas excéder "trois années consécutives, du jour où Messrs. "A. Barbier and Co. auront rendu l'immeuble en-"tre les mains de Mr. Bouffé, qui pourra sous-"louer le dit immeuble aux prix et conditions "qu'il jugera convenable, pour, sur le prix des "loyers, se payer de tout solde qui pourrait à ce "moment lui être dû et aussitôt que le dit sieur "Bouffé aura été intégralement payé en capital, "intérêts et frais, s'il y a lieu, il devra rendre le "dit immeuble au dit sieur Martin Moncamp "cédant, qui sera alors tenu d'éxécuter pour "le temps qui en restera à courrir, tout bail "qu'aurait pu faire Mr. Bouffé, en éxécution "des conventions ci dessus.

"Les frais d'enregistrement des presentes, s'il "y a lieu, seront supportés par M. Gaston Mar-"tin Moncamp.

"Tout ce que dessus est accepté par Mr. "Bouffé."

Of the same date, the same declaration was made, word for word, in relation to the portion of the subjects under lease to the Planter's Dock Company.

On the ninth January 1866, a Declaration issued at the instance of Bouffé, claiming payment of the sum of $600, then due and unpaid, as the rents of the two preceding months of November and December 1865.

On the 13th January 1866. Barbier pleaded not indebted.

Mr. Martin Moncamp presented a Petition for *Cessio Bonorum*, on the 24th January 1866, which was filed on the same date.

Subsequently, *viz*: on 21st February, Barbier moved leave to add to his Plea these words that, even admitting that the said Defendants are indebted to the said Plaintiffs as, by this latter alleged, in his Declaration, there is now, in the hands of the said Defendants, an attachment against the payment of the rent of the premises, *i.e.* 'L'Etablissement Bretonnache' "occupied by "them, which attachment must be removed be-"fore the payment of such rent can be claimed "from them, the said Defendants, by the said "Plaintiff."

"And further why the said count should not "be entered of Record in this cause."

The attachment here referred to bore the last mentioned date, 9th February 1866, and had been laid on to secure payment of the sum of £1.125 said to be due to Mr. Arsène Maroussem, for 3 months interest on the principal sum of $50,000 lent by him, on mortgage, to Martin Moncamp, on the said property, by notarial deed of date 11th November 1861.

Proceedings were taken, before the Master, for the sale of the property, under a forcible ejectment insisted on at the instance of one Arthur Sibally as seizing creditor of the subjects in question.

This seizure had been denounced to the debtor, on the 18th January 1866, Bouffé appeared and moved that the lease made to him should be inserted in the conditions of the "*Cahier des Charges*." This was opposed on the part of Maroussem, he was allowed to intervene and Judgment was given by the Master refusing to allow the clause demanded by Bouffé.

The deeds of 5th December 1864 were transcribed, but not till the 6th March 1866.

The different questions among the parties, creditors of Martin Moncamp, came before the Court, for determination, under: 1st, the action of Bouffé against Barbier and Cy.; 2dly, the attachment by Maroussem, the validation of which was moved for in Chambers and was referred to the full Court; and 3rdly, an appeal to the Court from the Judgment of the Master.

J. L. Colin for Bouffé: Having advanced a large sum of money to Moncamp, I secured the repayment by taking a conveyance of the rents due by Barbier and also of the lease itself, if the rent should, from any cause, not be paid. Barbier, the tenant, not only accepted the transport to me, but expressly intervened and undertook to make good the payments to me; so, I had an accumulation or novation of my right; and a personal obligation by Barbier was super

added to my other securities. C. N. VI, 1. 376. S. 1839.2.327. S. 1847.1.706. S. 1832.1.286.

He can have no defence against my demand for the 2 months rent, as Maroussem's opposition, which he desires to be allowed to add to his pleas, was not laid on till long after my suit was raised.

My right is farther protected by the option which I had, under the deeds of 5th December 1865, of electing to continue as the lessee of the property. I exercised my right of choice on the 5th March last. I am now the lessee of the subjects in question and that for a period of 3 years only. Such a lease is an act of ordinary administration and does not require transcription to be binding on third parties. (Ord. of 1863 Article II §6.) The true position of Moncamp and my client was this, that he did not transfer any rents to me; he allowed me to sublet and pay myself by setting off the rent. I am entitled to have my lease inserted in the "Cahier des Charges." Possibly an after question as to the effect of the lease may arise, but in the meantime, it ought to appear in the conditions of sale.

THE HONORABLE V. NAZ, for Maroussem: My title is a regular mortgage over this property for an advance of £50,000; dated 11th November 1861 and inscribed the next day. The lease in favor of Bouffé was not transcribed till the other day, and so, by our Ordinance No. 35 of 1863, borrowed from the French law of 1855, is of no avail against a third party like my client, having rights secured over the immoveable property. See §2 article 7.

The rents were immobilized from the date of seizure. C. Civil Procedure 689—Chauveau sur Carré V. P. 584, and 2,287. There was here an attempt to sue for rents for more than 1 year. This is specially prohibited by §7 of the 2nd article of the Ordinance of 1863.

It is said that the assignment was only a conveyance of the fruits, not of the immoveable itself; but my security extends over the fruits, and beyond a period of one year; the assignment is invalid. The pretended right in Bouffé to exercise an option fell by the filing of Moncamp's Petition for *Cessio*. After that date no election could be made. This pretended lease is just an underground attempt to defeat the Ordinance, as to Inscriptions, by making a "transfer" of rents good for more than one year. TROPLONG, Transcription, Nos. 122, 201, 202, 203 and 205.

P. L. CHASTELLIER, for the Assignees of Lemière, asked to be put out of the cause, with costs.

L. ROUILLARD, for the seizing creditor, abides by the decision of the Court

JUDGMENT.

It does not appear to us that there is much difficulty in arriving at a Decision in the case of Bouffé *v* Barbier. It will be observed that the Defendant Barbier intervened in the deed between Bouffé and Moncamp and bound himself and his firm, in the most express terms, to pay directly to Bouffé, every month, the rent as it fell due. Instead of fulfilling his obligation by paying the two months rent of November and December 1865, which is all that Bouffé asks in his Declaration, he put in a general plea of not indebted. There was plainly, at that time, no reason whatever why he should have refused to pay the demand of Bouffé, it was not till the ninth of February thereafter that Maroussem laid on an attachment in the hands of Barbier, for 3 month's interest, said to be due to him as a creditors, under a mortgage of the subjects, dated in 1861. But till the seizure of the other mortgage creditor, Sibally, was denounced to the debtor, which was not till 18th January 1866, the rent could not be immobilized, so as to become the property of the mortgage creditors. Accordingly in any view and whatever may be the extent and nature of the obligations generally contracted to Bouffé by the parties, under the deeds of December 1864, the two months rent claimed by Bouffé must be awarded to him as against Barbier.

In the action, therefore, at the instance of *Bouffé* v *Barbier* the order of the Court will be as follows:

In the reference from the Judge at Chambers, Barbier will be allowed to add the plea, according to his motion, made before the Judge at Chambers and in the action itself, the Court finds in favor of the Plaintiff Bouffé with costs of suit and of the procedure at Chambers and with costs against Maroussem, on his intervention.

The question remaining between Bouffé and Maroussem are certainly of no small importance, and are not free from difficulty; We have to consider whether the cession of the rents and of the lease to Bouffé, by Martin Moncamp, are such conveyances as required to be effectual against a third party in the position of Maroussem, to whom the property had been mortgaged for a very large advance by him to the proprietor, in the year 1861. Now the solution of this question depends upon the precise legal nature and effect of the transaction between Bouffé and Martin Moncamp, bearing the date of the 5th December 1864; (read clauses) Bouffé makes an advance to Martin Moncamp of £5,307, equivalent to the rents to be drawn from the subjects during the currency of the lease, calculating interest at the rate of 9 o|o. In security of the sum so lent to the proprietor, the latter transfers to Bouffé the rents of the whole term of the case, *i. e.* for some 21 months still to run. Now, had the deed stopped here, there is little doubt but the "*cession*" would have been struck at by § 7 of Article II of the Ordinance of 1863, for amending the laws as to the transmission and mortgaging the immoveable property. That section enumerates among the deeds which must be transcribed if they are to operate against third parties: "Every deed or Judgment establishing "discharge or transfer of rent not due at the time under any lease whatsoever of house property, when the amount thereof exceeds one year's rent.

So far at least, therefore, as the conveyance of rent by Martin Moncamp to Bouffé exceeded the

rent of one year, the assignment would be invalid and ineffectual to bar the right of the mortgagee, after the rents should have been immobilized. But the assignment of the rents was by no means the whole of the security for which Bouffé stipulated and which he obtained when he made the advance to Martin Moncamp. The agreement of parties went a great deal further and it was stipulated as an "essential condition" of the agreement "que si pour une cause quelcon- "que ....." (read clauses.)

Now, has the condition been purified on the existence of which these covenants were to come into operation?

Undoubtedly they have. The rents will not be paid to Bouffé, under the assignment, except to a very small extent; so, that portion of his security has virtually come to nought, and the condition on which the right of lease was to open, now exist, *viz*: that Barbier has failed to pay a part of the rents assigned, Bouffé is entitled to hold the subject as tenant for a term not exceeding 3 years from his getting possession from Barbier; and to the effect of securing payment of his advances, interests and expenses. Now there was nothing unreasonable in Bouffé taking such a security for repayment of the loan made by him to Martin Moncamp. Is there anything, in the circumstances of the parties or of the other creditors of Martin Moncamp, rendering such a security ineffectual? As to its duration there is nothing excessive. It cannot last for more than three years, for, by Ordinance of 1863, such leases do not require transcription, to be effectual against 3rd Parties: "Leases of House property," not duly transcribed, shall be "maintainable against "3rd Parties, for any period not exceeding three "years."

It was argued that, to give effect to this lease, would be to make an assignment of rents, not due at its date, effectual for more than one year, in the face of the enactment of the Ord. of 1863. But this is not the case. It is only when the assignment of rents ceases to be effectual, that the lease come into operation and it connot endure, in any state of matters, beyond 3 years from its commencement or for such shorter period as may enable Bouffé to get repayment of the advances made by him. There is nothing, in all this, opposed either to the letter or the spirit of the Ordinance of 1863.

It was further argued, on the part of the mortgage creditor, that Bouffé could not make his election and fall back upon the clause entitling him to hold the subjects in lease, after Martin Moncamp had filed his petition for *Cessio Bonorum*. But we do not think that the filing of the petition in *Cessio* had any such effect. The Estate of the Insolvent would pass to his creditors, under all the lawful burdens which he had imposed upon it, and the very fact of his insolvency rendered it the more necessary that Bouffé, or his own protection, should look to his securities connected with the immoveable subjects in question, the only thing he had then to rely upon for repayment of his advances.

We, therefore, annul the attachment laid on by Mr. Maroussem, with costs, and in the Appeal from the Decision of the Master, we allow Mr. Maroussem to intervene in the proceedings, sustain the Appeal and order that the lease from Martin Moncamp in favor of Bouffé, for 3 years, from the lease to Barbier, be inserted in the conditions of sale of the immoveable subjects in question, with costs to Bouffé.

The Assignees of Lemière, for whom Mr. Chastellier appears, are put out of the cause, with costs.

SUPREME COURT.

PRIVILÉGE DU VENDEUR,—HYPOTHÈQUE,—RENOUVELLEMENT D'INSCRIPTION, — ORDRE, — BORDEREAU DE COLLOCATION,—APPEL D'UN JUGEMENT DU MASTER,—C. CIV. ARTS. 2154,-2108,—C.C.P. ART. 834.

Le créancier subrogé aux droits d'un vendeur perd son droit de suite sur l'immeuble vendu s'il n'a point renouvelé son Inscription dans les dix ans de sa date, même l'orsqu'il a été colloqué à l'Ordre fait sur une seconde vente du même immeuble qui a été transcrite et qui a moins de dix années de date.

VENDOR'S PRIVILEGE,—MORTGAGE,—RENEWAL OF INSCRIPTION,— "ORDRE,"—"BORDEREAU DE COLLOCATION,"—APPEAL FROM MASTER'S DECISION,—C.C. ARTS. 2,154-2,108,—C. C. P. ART. 834.

A holder of a vendor's right who had received a "Bordereau de collocation" on the sale of an Estate, having failed to renew his inscription for more than ten years and till after the sale to third parties had taken place, was found to have lost his inscription among the mortgage creditors of the Estate.

FORTIER,—Plaintiff,

Versus

WIDOW DIORÉ & ORS.,—Defendants.

Before:

His Honor the CHIEF JUDGE, and
His Honor Mr. JUSTICE BESTEL.

P. L. CHASTELLIER,—Of Counsel for Plaintiff.
A. J. COLIN, —Plaintiff's Attorney.
E. LECLÉZIO, *junr.*, —Of Counsel for Wid. *Dioré.*
V. BOULLÉ, —Attorney for the same.

16*th October*, 1866.

This was an appeal from the Decision of the Master, in the "Ordre" of the sale price of the Estate "*Les Salines*," in the District of Black River, bought at the Bar, on the 12th September 1863, by Madame Auguste Boileau, for the price of $22,000. The property was sold by levy as against M. Joseph Dioré. The Appellant Fortier's claim had been rejected by the Master, on the ground that his inscription had not been renewed within 10 years of its date and that, therefore, his right to take any place in the ranking had fallen to the ground.

The facts were these. The Estate "*Les Salines*" formerly belonged to the late Mr. Fortier, father of the Appellant.

On the 26th February 1836, Mr Fortier Senior sold it to the late Auguste Boileau and in the deed of sale there was a subrogation of payment of part of the sale price to his son, the present Appellant, in satisfaction of his legal Mortgage and other claims which he had against his father.

On 12th July 1844, Fortier took an inscription with privilege of vendor. On the 10th December 1845 the Estate was sold by levy against Boileau and purchased by Joseph Dioré, for $20,000.

On 12th July 1847 an "Ordre" on this sale price was closed, in which Fortier, the Appellant, was ranked has holding a "créance privilégiée" for the sum of $5,082.92, and received his "bordereau de collocation" on 16th June 1848.

On 10th December 1863, Dioré, in his turn, was ejected by levy, and the Estate was purchased by Madame Boileau. This sale was transcribed on 18th February 1864. Fortier produced at the "Ordre" and he renewed his inscription, but not till the 8th March 1865 On occasion of this last sale in 1863, Madame Boileau, the purchaser, as already stated, transcribed her title and thus was followed by the usual "inscription d'office." The claim of Fortier, as we have seen, was rejected by the Master, on the ground that his title had never been renewed, or, at all events, had not been renewed till after the expiry of ten years from its date.

P. L. CHASTELLIER, for Appellants.—It must be observed that my client holds on original vendor's right valid and effectual before the sale to Dioré. How can Dioré's creditors compete with him, when Dioré, himself, was ejected for non-payment of his sale price. It is said that my claim is struck at by Art. 2,154 of the CIVIL CODE which required that an inscription be renewed every ten years, but there are exceptions to this case, and my case is within the exceptions. All Authors are agreed that when the inscription has produced its effect, no renewal is required. See GILBERT, No. 14, on the Article and following numbers where a mass of Authorities is collected. It is no doubt a question very much controverted to fix the point of time when the effect has been produced; but my client stands here in a most favorable position as in the judicial contract implied in an Order before the Master. I got Judgment in my favor, settling my rights as to all the world, and giving me an indisputable "droit de préférence." TROPLONG Priv. et Hypoth. V. III, No 717, 720. Part. II, 1054-1056.—ZACHARIÆ V. VI. Page 223 —DALLOZ, Repert Priv. & Hypoth. Page 301, No. 7. C. No. 2.1 259. *Secondly*: Admitting that I was bound to renew my inscription, I did so in March 1865, and that was not too late to secure me in all I ask, *viz*: "*a droit de préférence.*" I do not claim any "*droit de suite.*" I wish to exercise no resolutory action whatever; I am a privileged not merely a mortgage creditor; Inscription is only necessary to set my right in motion. It exists *per se* C. C. 2.095, 2,096; TROPLONG Vol. 1. No. 266, Part III, page 295, No. 250. This author points at a distinction, *viz*: The "*droit de suite*" which may be lost, and the "*droit de préférence*" on the price. The latter is all I contend for. There is no attempt to seize the property. We are merely creditors struggling for the division of the price of the lands which have been sold. DALLOZ Priv. & Hyp Chap. 1, No. 4.

But, it will be said, we have not transcribed our title in terms of Article 5, 6, 7, 8 and 9 of the Ordinance No. 36 of 1863, which came into operation, on 1st June 1864. But we are not under Article 6. The second part of it covers our case. Then it will be said that we did not inscribe of new within the 45 days allowed by the Ordinance; but what is the legal penalty of such an omission? simply that the "*droit de suite*" is lost; but we ask nothing of that kind, we wish to exercise no resolutory action; all we ask is a right of preference in the distribution of the sale price; the object of the Ordinance is only to protect 3rd parties; this is very clearly shewn on reference to Art. 23rd of the Ordinance; we do not ask to interfere with them here, and the Court will not extend the operation of any penalty.

In the 9th article of the Ordinance it is said that, at the date of adjudication, an Inscription has produced its effects; this bears on the first head of my argument.

If I should fail on those two grounds, I have, still, another. I contend that the inscription of the title, by Madame Boileau, "d'office" secures the right of my client. I hold, against Joseph Dioré, a vendor's claim. It was duly recognized in the "Ordre" of 1847. Transcription preserves the claim of a vendor. C. C. 2,108. DALLOZ "Jurisprudence Générale," 42.2.96; 39.2.68; 33.2.6; 37.2. 160 and 188.

J. COLIN, for Widow Fondaumière, an inscribed creditor: Fortier's right is bad in Law. The dates are all important. (Recites dates.) A privilege is a quality which may be lost by not observing the rules of Law. Inscription, no doubt, gives a "*droit de suite*," but, if it is lost, the quality of the claim cannot preserve it in force. Till inscription or transcription the claim did not really affect the Estate. C. C. Article 2,106, 2,108.

While the property remained in the hands of the orinal purchaser, Fortier would not have required to renew, even after the lapse of 10 years. This, although formerly disputed, may be now admitted. C. N. S. 1. 329; S. V. 32. 1. 151; S. V.

46. 2. 443. But the Estate passed into the hands of a stranger, Dioré, in 1845. Fortier's position was, I admit, still a good one, and he got a warrant of collocation in 1848. A considerable lapse of time took place; Fortier's position was still good, but there were risks which he had the means of avoiding, if he had taken care. On the 18th February 1864, when transcription took place, he had 45 days, but he did nothing till March 1865. Now, things were altered, the former purchaser is gone and a third party is in the field. Originally no claim was effectual if not transcribed or inscribed. Imprudent vendors often did neither, and were driven to use the remedy of a resolutory sale. The 834th Article of the CIVIL CODE OF PROCEDURE applied a remedy. Fifteen days were allowed, to inscribe, after the deed of alienation of the property. Publicity is the all important element. There is a second condition, *viz*: That before expiry of ten years from its date, the inscription of a mortgage must be renewed. The penalty of neglecting this is the loss of the position of a creditor of the Estate. TROPLONG. Priv: et Hypothèque. Vol. 1. No. 286.

The fact of a "Bordereau de collocation" being issued gives no additional strength to the case of the Appellant. C. N. 5. 1. 403; *Ibid* 2. 256 S. 33. 2. 426. C. N. 9. 2. 83; S. 45. 1. 53. DURANTON, Volume 19, No. 171.—PERSIL. Priv. et Hyp. No. 6;—GRENIER 2. 377. S. V.—CASSATION 47. 1. 59; here, TROPLONG, himself, gave the conclusions. S. V. CASS: 53. 2. 406; S. V. 34. 2. 160.

G. GUIBERT, for Madame Joseph Dioré: The Appellant's claim may put mine in jeopardy, so, I most oppose it. It may be that the local Ordinance of 1863 has no bearing on this case, as it came into operation only in June 1864, *i. e.* after all the important dates in the present case; but, that would only send us to the older Law. There are two questions. Is Fortier's right still effectual, or is her inscription wiped off? I say it is gone, for, privileges require inscription. In France, the seller must, now, inscribe within fifteen days of the Estate passing into the hands of a third party, or he loses his rights. TROPLONG 1. No 284. An "Ordre" only covers things as they were at the date of the sale and moment of adjudication.

There were four parties in the first "Ordre," three of them have been paid off, only Fortier, the Appellant, remains unpaid, but our claims were not then in existence. DALLOZ (Priv: & Hyp: No. 1,678) is not quite of the same opinion as TROPLONG, but he says that it is not till after the closing of the "Ordre" and the delivery of the "Bordereau" to the creditors that the mortgage can be said to have received its effect. Several eminent writers contend that the rights of parties are fixed as at the moment of the adjudication. This is generally quite true; but in the present case, the rule cannot apply, as our debts were not then in existance. TROPLONG V. III, Nos. 720, 725. If the inscription is not renewed the whole hypothecary system of the CODE would fall. GRENIER, V. 1. No. 113.—PONT, AD: Art. 2, 152 § 5. DALLOZ, Repertoire Priv: & Hyp: No. 1678.

It is farther argued that Fortier's inscription in 1865 is sufficient to preserve his "droit de préféreuce," which is all that is asked here. But a sale by a purchaser purges the right of a previous seller. TROPLONG, A D: Art. 2, 106, V. 1. on inscription, after the second sale, is useless. *Ibid* Nos. 279, 282.

The third point urged by the Appellant is untenable. It is contended that the inscription taken by Mrs. Boileau in 1863, preserved his right; but the Appellant had nothing whatever to do with that sale; his right had fallen, before its date.

Counsel also relied upon the following Authorities. TROPLONG, Priv: Volume 1. No. 286 *Bis*,—DALLOZ. Repert. Priv: & Hyp: § 66.—TROPLONG, Transcription, No. 294.

E. LECLERZIO, *junior*, for Widow and Heirs of Pierre Dioré: My clients are subrogated in vendor's rights. In the mean time and at the present moment, I have no direct interest in the present discussion.

W. NEWTON, for Albin Dioré: My client is a son of the original purchaser, he claims on the legal mortgage. The only point I require to argue is the first ground attempted to be maintained by the Appellant.

Before a hypotheque can receive full effect, I submit that actual payment is required. Publicity is all in all, and here there was no renewal and therefore no publicity; a lapsed inscription is entirely without value. TROPLONG, V. III. No. 719.

P. L. CHASTELLIER, in reply: On the other side, the real nature of my claim is not attended to. It is a vendor's right. It is admitted that if I had inscribed, within 45 days of last sale, I should have been all safe.

The great point is, did my inscription receive effect? I say that it did, as I got a warrant for payment. The Judgment of the Court of Toulouse, DALLOZ, 31. 2. 28, is I contend, correct, tho' TROPLONG is against it. My inscription, in 1865, was before the last 'Ordre' and I claim, only, a right of preference: no right to revendicate the Estate. Both sales here were transcribed, and transcription gives as great publicity as inscription, and a purchaser should search both registers, equally, before he buys.—PONT, No. 249.275. — DELVINCOURT, VIII. Page 286.—DALLOZ, 28.2.249.

THE COURT.

By the well known article of the CIVIL CODE viz. 2,154, the Inscriptions of Mortgages must be renewed within 10 years from their date, otherwise, as the Law expressly says, they shall cease to be effectual.

Art. 2,154.—"Les Inscriptions conservent l'hy-
"pothèque et le privilège pendant dix années, à
"compter du jour de leur date; leur effet cesse,
"si ces inscriptions n'ont été renouvelées avant
"l'expiration de ce délai."

It is unnecessary to go into the reasons of this law which is founded on very obvious grounds of public policy and conveniency. The rule is applicable to Mortgages of every description, even to those taken "*d'office*" by the Conservator, and to the legal mortgages of married women, minors &c. But, on the other hand, when the mortgage has produced its effect, a renewal of the inscription is not required. This may be said, in one sense, to be a self-evident proposition, for, when the mortgage has produced its effect, the matter is at an end and the inscription is no longer required but the practical application of the legal principle to the ever varying facts of particular cases is attended with much difficulty, and very great difference of opinion is to be found amongst the leading FRENCH writers, on the subject.

Let us take the case where the difficulty most frequently arises, *viz.* when the immoveable property of a debtor has been seized, and it becomes necessary to fix the respective rights of parties interested in it. At what point of time in the procedure shall it be said that the right of an inscribed creditor has so far received effect, that he is no longer subjected to the rule that if he does not renew his inscription, he shall lose the benefit of the position which he holds among the mortgaged creditors of the debtor. Some writers have said that the point of time is the date of the denunciation to the common debtors; some have maintained that the date of the notification to the creditors by the public announcements required by the CODE OF CIVIL PROCEDURE, is the period; some that the date of adjudication to the purchaser, is the time; some that the "Ordre" must be opened and the "*Bordereaux*" delivered to the creditor, before the Mortgages can be said to have received effect; while other writers maintain, certainly a very safe opinion and which will necessarily cover every case, that till actual payment has been made to the creditor, the mortgage has not received full effect and a renewal of the inscription is necessary if the ten years should expire in the meantime and before the creditor has actually got payment of his money. We do not mean to say that cases may not occur when something short of actual payment of the mortgage is not in the eye of the Law to be held to give full effect to the mortgage and render it unnecessary to have it renewed. It may be that there are no parties in the field but the creditors existing at the date of the first and only sale, and that so far as they are concerned, it may fitly and properly be held that their rights are finally determined by what has taken place in the "Ordre" and among themselves, tho' the amount due to each has not actually been paid. We shall not attempt to lay down any absolute rule as applicable to all cases. The great variety of opinion among so many eminent writers shews us the danger of doing so.

Well, then, to come to the present case with which we have to deal, it is admitted that Mr. Fortier, the holder of a vendor's rights, on the occasion of the first Order following upon the sale to Dioré, received "bordereau de collocation" for his share of the sale price; Fortier did not renew his inscription till after the lapse of 10 years, and till a fresh sale had been made to third parties, and a new Order opened, the ordinary effect of which is, of course, to purge the Estate of all encumbrances.

In the new Order which is at present before us what is Fortier's position? We have now a total change of situation. We now find in the field new parties, creditors holding mortgages under the first purchaser Dioré, or interested in his succession. How can they be bound in any respect towards Fortier, of whom they knew nothing, and were bound to know nothing? For, however strong his position originally was, he has not maintained it by keeping up his inscription, by the renewal required by Law.

But Fortier, or those acting for him, had the remedy in their own hands, if they had kept their eyes open and taken advantage of the safeguards which the Law itself provided for persons in their position. Fortier's rights were in jeopardy by the second sale to Madame Boileau, but he had his remedy. By the combined effect of Article 2,108 of the CIVIL CODE and Article 834 of the CODE OF CIVIL PROCEDURE, a creditor, in the position of Fortier, would have been protected by the inscription of his title, within a certain number of days after the sale to Madame Boileau. But, unfortunately for his interest, no such step was taken. It is of little moment, in our opinion, whether the Ordinance No 36 of 1864 (taking effect from 1st June 1864) should be held applicable to the present case or not; for, Fortier did nothing whatever, in the way of renewing the publication of his right, till 8th March 1865, and notwithstanding the ingenious pleading of MR. CHAS ELLIER, we are unable to perceive anything in the Ordinance, to assist his case.

It was strongly urged that a vendor's right is preserved by transcription, and that there having been transcription of the sale in the present case, Fortier's interests must be held to be saved But, as there were two sales of the subjects, we must enquire what transcription is here alluded to. It is the transcription of the sale to Madame Boileau; but, to that sale, Fortier was an entire stranger. The real meaning of the Law, here, appears to us to be very well stated by PAUL PONT, in the following passage of his treatise "des Privilèges et Hypothèques." Tit. XVIII No. 265:

"Le privilège du vendeur se conserve donc
"par la transcription. Mais la transcription de
"quoi? La Loi nous le dit en termes exprès,
"la transcription du titre *qui a transféré la pro-*
"*priété à l'acquéreur*, et qui constate que la tota-
"lité ou partie du prix est due au vendeur. C'est
"donc bien mal entendre la Loi que de décider,
"comme l'a fait la Cour de Bruxelles, que dans
"le cas de deux ventes successives d'un immeu-
"ble, la transcription faite par le second acqué-
"reur, de son contrat d'acquisition, conserve le
"privilège du premier vendeur qui n'a pas fait
"transcrire, si le deuxième contrat mentionne le
"premier et la créance du vendeur originaire.
"Evidemment, dans les termes comme dans l'es-
"prit de la Loi, le vendeur assure son privilège
"par la transcription de son propre contrat, et il
"ne saurait le maintenir par la transcription
"d'un contrat qui lui est étranger. La Cour de
"Cassation a dit, en d'autres termes, mais avec
"une exactitude parfaite," que "le privilège du
"vendeur ne se conserve que par la transcription

" *du contrat d'où il résulte* et non par celle des " contrats ultérieurs."

This Appeal must, therefore, be dismissed, with costs.

SUPREME COURT.

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QUITTANCE MUTUELLE ET DÉCHARGE,—ORDRE,—APPEL D'UN JUGEMENT DU MASTER.

Termes établissant une décharge mutuelle entre deux frères et s'opposant à ce que les créanciers de l'un d'eux puissent exercer aucun droit contre l'autre, par la suite.

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MUTUAL ACQUITTANCE AND DISCHARGE,—" ORDRE,"—APPEAL FROM A JUDGMENT OF THE MASTER.

Terms of a mutual discharge between two brothers which was held to prevent the heirs of one of them, afterwards, claiming as a creditor of the other.

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WIDOW PIERRE DIORÉ & ORS.,—Appellants.

Versus

JOSEPH DIORÉ & UX. & ORS.,—Respondents.

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Before:

His Honor the CHIEF JUDGE and
His Honor Mr. JUSTICE BESTEL.

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E. LÉCLÉZIO *Junior*, — Of Counsel for Appelant.
V. BOULLÉ, —Appellant's Attorney.
G. GUIBERT, —Of Counsel for J. Dioré & Ux.
R. DUCRAY, —Attorney for the same.
J. L. COLIN, } —Of Counsel for contesting
W. NEWTON, } creditors.

—

16*th October* 1866.

The questions between the parties arose in the distribution by way of an " Ordre " of the sale price of the Estate " *Les Salines* " sold at the Bar against Joseph Dioré, the proprietor, on the 10th October 1863, to Madame Boileau, for the price of $22,000.

Before the Master, the Widow and heirs of Pierre Dioré were held not to have any right of collocation on the Estate of Joseph Dioré, and that, on the ground that any claim, which, Pierre Dioré may have against Joseph Dioré, was settled by an agreement entered into between those two parties, on the 9th September 1850, whereby they give each other a full discharge of all claims and debts whatever.

The Widow and Heirs Pierre Dioré Appealed.

E LECLEZIO *Junior*, for Appellant: Joseph and Pierre Dioré were brothers. There were two conditions in the deed, before the mutual discharge was complete, *viz*: 1*st* the sale of the " Boulangerie Dioré," and *secondly*, the sale by Joseph to Pierre, of his share in their mother's Babet Dioré's succession.

The second condition has been accomplished; the first has not been properly carried out, for, although the Bakery has been sold, it is covered with inscriptions of mortgages. There is no doubt a latter writing of 12th November 1860, subscribed by Joseph Dioré, in which he says that by the sale made to Pierre, of the Bakery, and the " justification que j'ai à lui faire du " paiement de tous les titres, sommes et va- " leurs " in which Pierre had engaged himself for the Bakery, all claims are mutually closed; and the writing goes on to say: " En conséquen- " ce, je m'oblige à lui faire, sur sa première ré- " quisition, remise de tous documents, titres et " pièces qu'il lui conviendrait de me réclamer, re- " lativement aux affaires, et qui, dans tous les " cas, se trouvent annulés par le présent."

" Après laquelle justification, seulement, je " pourrai requérir de M. Pierre Dioré quittance " et main levée de créance qu'il a contre moi."

It was Joseph who should have got the justification. He had the real interest to do so, not Pierre, and so the claim of the latter is not extinguished by those writings.

J. COLIN, for the Widow Fondaumière: I oppose the collocation of the Widow and Heirs of Pierre Dioré, but I do not take an active position here, as the case will be fully stated by others.

G. GUIBERT, for Mrs. Joseph Dioré separated in property from her husband: I say the other parties have no claim here. All matters were finally settled between the brothers in 1859, by the deed already referred to. The allegation that certain burdens exist on the bakery is irrelevant, and in any view, there is no proof that they exist.

As to the second writing it is quite clear; Pierre was to take the first step. The paper were to be delivered " sur sa première réquisition."

W. NEWTON, for Albin Dioré, son of Joseph Dioré: My client had a legal mortgage on the subjects and he gave a " main levée " in virtue of a first agreement. He was no party to the second writing.

LECLÉZIO *Junior* replies: There was no such " main levée " by Albin Dioré, as is now alleged. He did not sign it. His interest was quite a special one. If he had intervened it would have been with all guarantees. I produce Certificates of Inscriptions on the property. *Prima facie*, that is enough.

Regarding the paper of 1860 the words "sur sa première réquisition" occur in the middle of the deed. The whole writing must be read to

discover the real meaning of the parties; Joseph Dioré is *in Cessio Bonorum*, and so, he cannot make the necessary justification.

THE COURT.

It appears to us that the Judgment of the Master must be affirmed. The writing of September 1859, expressly bears that the parties gave each other mutual discharges and acquittances of every thing whatever existing between them, up to that day. The Bakery was to be sold to Pierre, and Joseph assigned to him his share in the succession of their mother, Babet Dioré.

The other clauses of the writing are quite consistent with what is said at the commencement, that they had really and truly settled all claims.

Then, in the writing of 1860, given by Joseph to Pierre, it is said that no claim remains between them, and Joseph undertakes on the *première réquisition* of Pierre to send him all the documents, "titres" and papers which he would ask from him, relating to their affairs, and which are annulled by the present writing; after which justification only, it was that Joseph could insist on a discharge from Pierre and a "main levée" of the debts which he owed him. The writing may be somewhat awkwardly expressed but we think that it was incumbent on Pierre Dioré to take the first step to have a formal settlement by getting up all the papers from his brother, and that if he did not do so, he cannot allege that there was no settlement at all, in the face of the leading and positive declaration in both papers.

The appeal is dismissed with costs

BAIL COURT.

DÉTOURNEMENT,—PREUVE PAR TÉMOINS,—APPEL ET JUGEMENT DE MAGISTRAT DE DISTRICT,—ORD. No. 35 DE 1852.

Sur une accusation de détournement d'un objet d'une valeur de plus de 150 *fes. il n'est pas nécessaire, en matière criminelle, qu'il existe un commencement de preuve par écrit, pour donner lieu à l'action.*

CRIME,—EMBEZZLEMENT,—ORAL PROOF,—APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE,—ORD. No. 35 OF 1852.

In a charge of embezzlement of 50 *sovereigns handed to a jeweller, to be made into a necklace, written evidence is not required by the law and practice of Mauritius.*

GEEGAH,—Appellant,

Versus

THE QUEEN,—Respondent.

Before:

His Honor the CHIEF JUDGE.

V. GARREAU, —Of Counsel for Appellant.
E. MACQUET, —Appellant's Attorney.
S. J. DOUGLAS,—Of Counsel for Respondent.
J. BOUCHET, —Attorney for the same.

16*th October* 1866.

The Appellant, an Indian jeweller, was convicted before the District Magistrate of Port Louis, on a charge of embezzling 50 sovereigns given to him by one Massanekan, to be made into a necklace, and sentenced under Art. 333 of our PENAL CODE to 6 months' imprisonment with labor and £1.5.6 costs, and in default of payment, to 6 days additional imprisonment.

The Appellant had contended, in the Court below, that the amount being above 150 francs in value, the charge could only be maintained against him by written evidence and that parole proof was inadmissable; but the plea was overruled by the District Magistaate.

V. GARREAU, for Appellant, submitted written evidence was alone competent. CHAUVEAU ET HÉLIE. V. VII. page 387—2. There is no proper proof of fraud here.

The Appellant might have returned the Articles given him to manufacture. There ought to have been a "*mise en demeure.*" CHAUVEAU & HÉLIE, Vol. VII. page 364.

2o. The Information did not set forth a crime known in our PENAL CODE. It did not state that the Appellant was to be renumerated for his work, and we have not here, as they have in France, since 1832, the case of "détournement" where no salary or renumeration is to be given.

S. J. DOUGLAS, for CROWN.—I admit that the French writers do require written evidence in cases above 150 francs, but this arises from a rule of French procedure that the civil remedy can be obtained along with the criminal prosecution. This is prohibited by our laws.

2o. There is no such thing as a "mise en demeure" in our criminal practice.

3o. The Information was made in the usual terms and charged embezzlement, by a workman, of property given to him to be manufactured. That is enough.

THE COURT.

There is no doubt that the French authorities in general, require, for the proof of cases of "détournement," evidence in writing when the amount is above 150 francs. They do so on the ground that: "les formes établies pour le Jugement des questions civiles sont les mêmes devant quelles que Juridiction qu'elles soient agitées; que ces régles dérivent de la Juridiction criminelle, il dependrait de parties lésées d'éluder la disposition de la voie civile, et en substituant à la preuve qu'elle à proscrite celle que l'instruction criminelle admet, en general." (CHAUVEAU & HÉLIE V. VII. page 388.) Now in the

case before us we have no civil question at all; we have a criminal prosecution really *ad vindictum publicam* and not involving any matter of civil right. Indeed, by our law, the two cannot be combined in one prosecution. Seeing that this is the law in Mauritius and that in a charge of this nature fraud or *dol* is implied, I am unable to adopt the rule of the French law, that is to say that cases like the present, in a criminal Court, can only be proved by written evidence.

The other grounds of appeal do not appear to me to be important. The charge was distinctly stated. The proceedings in the Court below were in accordance with the established practice, and the proof of the embezzlement was complete.

Appeal dismissed, with costs.

SUPREME COURT.

SOCIÉTÉ,—ASSOCIÉS ET LEUR RESPONSABILITÉ,—MARCHÉ A FORFAIT,—INTÉRÊTS PAYÉS SUR COMPTE-COURANT.

L'Associé qui, à son entrée dans la société, accepte conjointement avec les co-associés, à forfait, les affaires actuellement pendantes, se rend par là responsable de tout ce qui aura été fait pour et à l'occasion de ces affaires, même avant son entrée dans cette société.

PARTNERSHIP AND LIABILITY OF PARTNERS,—AGREEMENT "A FORFAIT" (EVENTUAL BARGAIN),—INTEREST ON ACCOUNT CURRENT.

The party who joins a firm and accepts jointly with the other partners "à forfait" the affairs then being carried on, is deemed responsible for all that has been done in and concerning such affairs and even for that which has been done before his being admitted a member of such partnership.

MOURGA VAYABOURY & ORS.—Plaintiffs,

Versus

BOULANGER, ROSTAND, AND TENNANT, Defendants.

Before:

His Honor MR. JUSTICE BESTEL, and
His Honor MR. JUSTICE COLIN.

J. COLIN, —Of Counsel for the Plaintiff.
A. J. COLIN, —Plaintiffs' Attorney.
A. LEGALL, —Of Counsel for Defendants.
E. DUVIVIER,—Defendants' Attorney.

16th October, 1866.

The Plaintiffs, heirs of the late Mourga Vayaboury, their father, now deceased, brought their action against the Defendants A. Boulanger, H. Rostand, and A. Tennant, to recover the sum of $641.86, being the balance of an account current between the said late Mourga Chetty and the Defendants.

A. Boulanger and A. Tennant suffered Judgment by default, but H. Rostand pleaded to the action. Several pleas were put upon Record, but two only were in reality maintained. The Defendant argued, in substance, that the debt was contracted before he was a member of the House; *secondly*, that at all events, the Plaintiffs had no claim. It was also urged that interest was claimed against and should be allowed to the Defendants.

J. COLIN was heard for the Plaintiff and A. LEGALL for the Defendants.

JUDGMENT.

The Defendant Rostand was not, it is true, a member of the House that contracted with the late Mourga Vayaboury, at the time that the first part of the account was run up between the House and Mourga Vayaboury; but when he joined the firm, it was agreed that the three partners accepted "à forfait," be they profitable or not, the affairs and transactions then pending or being carried on. This is shown by the articles of co-partnery dated February 12th 1858. This transaction or series of transactions with Mourga Vayaboury was, it is shown, then being carried on; and by his own act, the Defendant has chosen to undertake the liability, if any, which might arise out of it. There is, besides, other and very strong evidence to show that Rostand has assumed such liability.

The second point urged is that the claim is not made out. We think it is made out, and made out directly against Rostand.

An objection was also taken on the ground that no interest was allowed by the Plaintiffs who charged interest. The Plaintiffs do not charge interest, that we can see, upon the value of the goods sold to the Defendants; the interest they have received in the course of the transaction appear to us to be interest upon sums of money received by the Defendants for Mourga or paid cash, by Mourga, into the Defendants' hands.

There are however two sums which were also paid cash by the Defendants to or for account of Mourga Vayaboury. Those sums are: 1o, $515 paid to J. & J. Brodie, on 28th July 1856, and £200 paid to Mourga, himself, on 17th March 1857. Now, as this is an account current, surely, if for money they received from Mourga Vayaboury, the Defendants are charged interest at 12 o|o, for 5 years; the Defendants were, on the other hand, entitled to charge interest at 12 o|o for 5 years, on sums they paid cash to or for Mourga. There is no private contract, as to interest, before us; this is quite

apart from the items concerning goods and merchandize upon which we find that no interest is claimed on either side.

Now, upon those two sums, interest charged at the rate and under the same rule as the Plaintiffs claim it in their account,

Would be: on...	$515	$300
And on the sum of...	200	129
	Total	$429

The sum claimed is	$681.80	
Deduct	429 ,,	
		$ 252.80

The balance remaining due will be $252.80. We think the Plaintiffs entitled to recover that sum, but no more.

Judgment will, accordingly, be entered for the Plaintiffs, in the sum of $252.80, with costs.

SUPREME COURT.

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DIVORCE,—PENSION ALIMENTAIRE, — AVANCES POUR FRAIS D'INSTANCE.

—

DIVORCE,—ALIMONY,—ADVANCES FOR COSTS OF SUIT.

—

CAZABAN THE WIFE,—Plaintiff.

versus

CAZABAN THE HUSBAND,—Defendant.

—

Before:

His Honor MR. JUSTICE BESTEL and
His Honor MR. JUSTICE COLIN.

—

E. PELLEREAU,—Of Counsel for Plaintiff.
F. GILOT, —Plaintiff's Attorney.
HON. V. NAZ, —Of Counsel for Defendant.
F. MALLET, —Defendant's Attorney.

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16*th October* 1866.

In this case, E. PELLEREAU had, on the 7th day of August last, obtained a Rule Nisi calling upon the Defendant to shew cause why he should not be ordered and condemned to pay, to the Plaintiff, a monthly sum of $30 for alimony of the Plaintiff and her child, pending this action, and also a sum of £30 forthwith, in order to enable the Plaintiff to proceed with her action in divorce.

On the 6th of September, the Rule having been several times enlarged by consent, HON. V. NAZ shewed cause and argued that no case had been made out to show that the husband had property sufficiently large to justify the claim made against him.

E. PELLEREAU was heard in support of the Rule.

JUDGMENT.

The wife is certainly entitled to alimony pending her action in divorce, when she has been authorized by the Court to reside, in the meanwhile, out of her husband's domicile. This Plaintiff has been allowed to reside out of the conjugal domicile, and the question is what sum shall be paid to her, in the way of alimony, by her husband?

There can be no fixed rule in a case like this, the social position of the parties, the wealth, or poverty of the husband, the fact whether the property belong to the community between Husband and Wife, or whether they be "Propres" of the Husband or Wife, are matters which must have their respective influence upon every application of this nature that comes before the Court, and it might not be easy to find two cases exactly similar. In *Germain* versus *Germain* the Court allowed a comparatively large sum, for, there, it was shown that the joint-Estate of Husband and Wife held by the Husband and chief of the community, was large. In other cases, the sum allowed has been very small, because the fund from which it was to be drawn, was also small. To do justice to these parties, it is necessary, therefore, to consider what the Husband's position is, and what property he is shown to have. The Defendant appears to have been a tobacconist but has shut up his shop, the reason which he gave to a witness is, that his business did not pay. He has two small houses in the Eastern suburb, but that real property does not form part of the joint-Estate of Husband and Wife, it is a "Propre" of the Husband, and the marriage-contract shows that the community is limited to "Acquêts." *A priori*, should the marriage be dissolved by a Judgment of this Court, the houses in question would remain the Husband's property. The Wife here cannot say that she is only asking part of what is her own, as well as her Husband's, to carry on her suit for a divorce, she, as the "Ministère Public" observes in his conclusions, does not establish that she has no means of raising money otherwise than by this Application.

On the whole, we think it is not a case where we should order the Husband to charge his "Propres" with the amount claimed by the Wife, to carry on proceedings which may be successful, but which may fail. Alimony should be granted, but the evidence adduces us to think that it should be small.

HON. NAZ offered $10 per month; we agree with MR. DOUGLAS that it should be $15 and the Rule will be made absolute for that amount, without costs.

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SUPREME COURT.

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INSOLVABILITÉ,—CESSION DE BIENS,—ORD. No. 23 DE 1856.

—

INSOLVENCY,—CESSIO BONORUM,—ORD. No. 23 OF 1856.

—

Consolidated Cessio Bonorum

OF

THE HEIRS LANOUGARÈDE.

—

Before:

His Honor THE CHIEF JUDGE, COMMISSIONER.

—

HON. V. NAZ,—Of Counsel for Petitioners.
W. FINNISS, —Attorney for the same.
L. ROUILLARD,—Of Counsel for Opp. Creditors.
E. DUCRAY, —Attorney for the same.

—

1*st October* 1866.

THE COURT.

The Petitioners in this case, some time ago moved that they should be found entitled to the benefit of a *Cessio Bonorum*. Certain of the creditors with debts to the amount of some $30,000, out of a gross liability of upwards of $600,000, in the exercise of their undoubted right to have the fullest investigation of their debtors' affairs, moved that the Petitioners should be examined in Court and also that a number of witnesses should be heard. Their motion was granted and the Petitioners have been interrogated and all the witnesses named have made their depositions. Nothing has been elicited to shake the *bona fides* of the Petitioners which is, of course, the basis of all proceedings in *Cessio Bonorum*.

Not only has there been nothing disclosed affecting prejudicially the character or conduct of the Petitioners, but it is obvious that by taking up the succession of their late father, Mr. Victor Lanougarède, " pure et simple," they have incurred a personal liability for all his debts, which they might have easily avoided had they been more prudent and cautious and had less respect for his memory.

Their private fortune have been swept away in the common ruin.

The Court must, therefore, give Judgment in favour of the Petitioners ; on making the usual assignment, they are found entitled to the benefit of *Cessio Bonorum*.

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SUPREME COURT.

—

INSOLVABILITÉ,—CESSION DE BIENS,—ORD. No. 23 DE 1856.

—

INSOLVENCY,—CESSIO BONORUM,—ORD. No. 23 OF 1856.

—

Cessio Bonorum EUGÈNE BAZIRE.

—

Before:

His Honor THE CHIEF JUDGE, *Commissioner.*

—

Hon. V. NAZ, —Of Counsel for Petitioner.
W. FINNISS, —Attorney for the same.
A. LEGALL, —Of Counsel for the Assignees.
E. DUCRAY, —Attorney for the same.

—

11*th October* 1866.

THE COURT.

This case has a close connection with that of the Heirs Lanougarède, in which the benefit of *Cessio Bonorum* was granted, the other day, to the Petitioners. The present Applicant is the grand-son of the late Victor Lanougarède, enjoyed his confidence, and assisted him in the management of his business. After his death the Petitioner was employed by the Heirs to continue the administration of their very extensive affairs.

No objection has been pressed against the present Motion for the benefit of *Cessio Bonorum*. It has, indeed, been said that the Petitioner, Mr. Bazire, was imprudent in putting his name on Promissory notes for his grand-father and his estate, to so large an amount. But, in this respect, the present case is clearly distinguishable from those in which the Court has found occasion to animadvert severely on the recklessness and imprudence of persons without means subscribing bills to a large amount for others who were known to have but little capital, themselves.

The Petitioner was possessed of considerable funds, and had a fair prospect of inheriting a good Estate. His late grand-father was at one time possessed of large means and he died with the general reputation of being a very rich man. The last thing that the Petitioner or the public generally could have anticipated was the deficiency in the Estate left by Mr. Lanougarède to meet its obligations. There is no doubt that Mr. Bazire, in all he did, acted in good faith and with the best intentions.

On making the usual assignment, the Petitioner will have the benefit of *Cessio Bonorum*.

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SUPREME COURT.

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HYPOTHÈQUE JUDICIAIRE,—CONCORDAT,—EXPROPRIATION FORCÉE,—APPEL D'UN JUGEMENT DU MASTER.

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Le créancier ayant pris une hypothèque judiciaire en garantie de sa créance, est lié par un concordat passé postérieurement par le débiteur avec ses créanciers, sous le contrôle de la Cour; il ne peut, en conséquence, poursuivre la vente des immeubles de son débiteur, en vertu de son hypothèque judiciaire, tant que dure le concordat.

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JUDICIAL MORTGAGE, — ARRANGEMENT UNDER THE CONTROL OF THE COURT, — SALE BY LEVY, —APPEAL FROM A DECISION OF THE MASTER.

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A personal creditor, who had taken a judicial mortgage, was held to be bound by an arrangement made afterwards between his debtor and the statutory majority of the creditors, and not entitled to insist in going on with the sale of part of the immoveable estates of his debtor, as long as the arrangement was binding on the personal creditors.

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DIORÉ,—Appellant,

versus

SLADE AND ORS.,—Respondents.

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Before:

His Honor Mr. JUSTICE BESTEL and
His Honor Mr. JUSTICE COLIN

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G. GUIBERT, —Of Counsel for Appellant.
V. BOULLÉ, —Attorney for the same.
E. LECLÉZIO Jr.,—Of Counsel for Respondents.
J. SLADE, —Attorney for himself.

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16*th October* 1866.

This was an Appeal from a Decision of the Master subrogating Slade, a Judgment creditor of the Appellant, into the proceedings taken several years back by Blyth Brothers & Co., against Dioré, for the sale by levy of a certain landed Estate belonging to Dioré and situate at the "Vallée des Prêtres." seized by the said Firm, as far back as the 26th day of November 1857.

The memorandum of levy was duly transcribed at the Mortgage Office, since which time no step has been taken to bring the seizure to an end, to the great detriment of the inscribed creditors and among whom the Respondent is one.

The reason for not giving effect to the seizure is to be found in an Arrangement made by Dioré with his creditors, under the control and with the sanction of the Court of Bankruptcy. Amongst the creditors who accepted the Arrangement proposed by Dioré were Blyth Brothers & Co., who, from the date of their acceptance of the Arrangement, abstained from following up their seizure made as far back as 1857.

It is with the view of following up that seizure that Slade has petitioned the Master, for subrogation.

This subrogation was allowed by the Master whose Decision is now disputed by the Appellant, on several grounds.

The most important of those grounds of Appeal is that the Respondent being merely a Judicial mortgage creditor cannot, as such, render abortive an Arrangement entered into by Dioré with his creditors, under the control and with the sanction of the Court of Bankruptcy.

In support of this position G. GUIBERT, for the Appellant, quoted the case of *Rouget* v. *Azor* (PISTON's Reports 1864, page 132) decided by his Honor the Chief Judge who, after consultation, with, and with the concurrence of the Judges, ruled that "The position of a personal creditor ("chyrographaire") who has taken a Judicial Mortgage is quite different from that of a conventional mortgage creditor.

That a Judicial Mortgagee cannot be considered as a mortgage creditor, in the sense of our Bankruptcy law, because he has a similar designation for the following reasons: 1st, Because the Judicial Mortgagee made no stipulation when he originally lent his money for a real security. 2nd, That, by conferring on a party in the position of Rouget (who merely had a Judicial Mortgage) the right for which he contends would necessarily tend to destroy that equality which ought to prevail amongst personal creditors, which it is the policy of the Law and of the Court to encourage.

For these reasons it was ruled that Rouget was bound by the Arrangement between Azor and his creditors. And it was contended, on the strength of the Decision, that Slade ought to be bound by the Arrangement between Dioré and his creditors, and therefore not entitled to the subrogation prayed for by him and allowed by the Master.

However, it was contended by E. LECLEZIO *Junior*, on behalf of the Respondent Slade, that a judicial mortgage having been invested by Law with all the efficacy inherent to the conventional and other mortgages, there was no distinction to be made between the one and the other. If no stipulation were originally made by a "chirographaire" it was because the personal creditor knew full well that in default of payment he

might obtain a Judgment to which the Law attach the same and indeed a larger guarantee than he might have originally secured by a conventional mortgage, *viz* : a mortgage on all the property of the debtor present and future, subject, however, to the rights of any previously inscribed creditors.

He contended, further, that the legal rights of parties could not be curtailed by any Court of Law whose duty was to ascertain what the Law was and to apply the same, regardless of the inconveniences consequent upon such application of the Law.

That the case quoted against Slade's subrogation, (*viz* :) *Rouget* v. *Azor* was not applicable to the case now in Court. The Inscription of *Rouget* had been taken on the eve of the Arrangement proposed by Azor, when the affairs of Azor were in such a desperate condition as to oblige him one or two days after the inscription taken by Rouget to propose an arrangement to his creditors. Whereas Slade's inscription is prior, by several years, to the Arrangement made by Dioré with his creditors ; long before such an Arrangement could be foreseen by Slade, and before Slade could be suspected, like Rouget, of a desire to secure any undue preference over the personal creditors of Dioré, by means of his Judicial Mortgage.

JUDGMENT.

There is no doubt that the applicant in this case, stands in a more favorable position than Rouget, in reference to Azor ; the applicant Judicial Mortgage having been inscribed several years before the now Respondent Dioré ever thought of making an Arrangement with his creditors. The Judicial Mortgage of Slade cannot, therefore, be looked upon like Rouget's, in the light of an inscription taken with the view of securing to himself an undue preference over Dioré's personal creditors.

Is this, however, a reason why Appellant, in this case, should enjoy a privilege which was refused to Rouget in a Judgment given in the matter of *Rouget* v. *Azor*, by His Honor the Chief Judge, after conference with his brother Judges.

The mere difference as to the time and date of the inscription is insufficient to disturb the principle which has led to the rejection of Rouget's claim to disturb the Agreement made by Azor with his creditors.

The object contemplated by the Bankruptcy Ordinance is equality amongst personal creditors.

The better to secure that end, the Law has invested the Official Assignee with the Estate, for the general benefit ; and his vesting operates a mortgage for all the creditors. To confer on a party, whether in the more favorable position of Slade, or in the less favorable position of Rouget, the right now contended for, would necessarily destroy that equality and would tend very much to the discouragement of beneficial Arrangement with creditors, which, it is the policy of the Law and of the Court, to encourage.

For these and the other reasons stated in the Judgment given in *Rouget* v. *Azor*, the opinion of the Court is that the Respondent being bound by the Arrangement entered into by the statutory majority of the creditors is not entitled to the subrogation prayed for, which would be affording him the right of forcing the sale of the immoveable subject in question to the prejudice of the personal creditors of Dioré.

Appeal is therefore allowed, but in this case, without costs.

COURT OF ASSIZES.

ATTENTAT A LA PUDEUR.—DU SERMENT ET DE SES OBLIGATIONS,—EXAMEN SUR VOIRE DIRE, —TÉMOIGNAGE D'UN ENFANT, COMME TÉMOIN PRINCIPAL, REÇU SOUS PROMESSE DE DIRE LA VÉRITÉ,—PRINCIPE DE NON RÉTROACTIVITÉ DE LA LOI,—ORDONNANCE No. 12 DE 1866, ARTICLES 6, 7 et 8.

Dans la Procédure Criminelle, ce principe ne peut être invoqué.

ATTEMPT AT CHASTITY, — OBLIGATION OF AN OATH, — EXAMINATION ON "VOIRE DIRE,"— EVIDENCE OF A CHILD AS PRINCIPAL WITNESS, RECEIVED UNDER PROMISE TO SPEAK THE TRUTH, — PRINCIPLE OF NON-RETROACTIVITY OF THE LAW,—ORD. No. 12 OF 1866, ARTS. 6, 7 AND 8.

The Law has no retroactive effect in its operation; but when it is question of the alteration not of the offense, itself, but of the mode of procedure by which such offense is to be tried, the rule does no longer apply.

THE QUEEN

versus

J. MORGAN.

BEFORE THE FULL BENCH.

Crown case reserved.

S. J. DOUGLAS,—Sub. Pro. & Advocate General.
E. PELLEREAU,—Of Counsel for Prisoner.

16*th October* 1866.

JOHN MORGAN was indicted on a charge of attempt at chastity and the trial took place on

17th September last. One of the witnesses called by the CROWN was the little girl on whose person the offence was alleged to have been perpetrated. She was not sufficiently acquainted with the nature and obligations of an oath, and the prosecution offered to take her evidence in virtue of Articles 6, 7, & 8 of Ordinance No. 12 of 1866, upon her promise to speak the truth.

E. PELLEREAU, for the prisoner objected, and after the girl had been examined on the "voire dire" as to her degree of intelligence, the presiding Judge, Mr. JUSTICE BESTEL, admitted the evidence, reserving the point for the consideration of the full Court.

The prisoner was convicted; and on 11th October, the full Court sat to hear Mr. PELLEREAU'S motion on behalf of prisoner.

Mr. PELLEREAU contended that the conviction was bad, because the evidence ought not to have been received. The Ordinance which allows children of a tender age to be heard as witnesses, upon their promise to speak the truth, when it has been ascertained that they are not sufficiently acquainted with the solemn obligations of an oath, came into effect, it is true, before the trial, but it is posterior to the commission of the offence, no law can have a retroactive effect. It would be giving to this law, a retroactive effect, if that which was not evidence before, could be evidence now. He cited:

Article 2—CODE CIVIL
MARCADÉ
HÉLIE AND CHAUVEAU ADOLPHE.

Besides, the girl did not know what a promise was.

J. DOUGLAS, in answer, urged: that the Ordinance provides for all future trials. I admit, he says, the principle urged, but it does not apply; remedial statutes are often suffered to have a retroactive effect; and when it is not the offence, but the procedure by which an offence is to be tried which is changed, that procedure must apply to past offences, or the offences would not be tried. Take trial by Jury, for instance, can it be said that an offence committed before the introduction of the Jury system, could not be tried by a Jury? if not, it could not be tried at all. Our Criminal Procedure Ordinance refers us to the English Law as our guidance, and is an exception to the general Law.

BROOM'S "legal maxim's" page 32.
6. ALL: & ELL: 951.

Mr. PELLEREAU was heard in reply.

JUDGMENT.

The English Law, like the French, distinctly holds that no Law is retrospective. The English Law cited by the SUBST. PROCUREUR GENERAL would go farther; for, LORD COKE'S Institutes lay down that "*nova constitutio futuris formant impovere debet, non proeteritis.*" That is to say: that a legislative enactment should be prospective, not retrospective in its operation. And justly so; for, rights vested under a law ought not to be modified or prejudiced by the Law given in virtue of a retrospective enactment.

The rule laid down by LORD COKE, and really borrowed from the Roman Law, (Pandects, 50, 1755) is one which not only the Courts of Law which administer Justice, but the legislature which enacts the laws which are to be enforced, must have constantly in mind. And if this be true as to the civil contracts, civil rights, civil obligations, it is much more important, if not more true, when applied to the administration of criminal Justice. No offence is to be extended or amplified by intendment or retrospectively, "*Nunquam crescit ex post facto proeterite delicti aestimatio,*" wrote the Roman legislation, and MR. JUSTICE BLACKSTONE, comm. S. I, 46, eloquently comments upon the cruelty and injustice of a contrary rule.

We are, therefore, of opinion, that, unless by clear, precise, undoubted enactment, the legislature has so ordered it, civil contracts are not prejudiced, offences are not created by subsequent laws. Nor do we require authority to lay down such a rule, it is so consonant with every principle of honesty and of Justice; so wound up with the security of contracts on the one hand, and the safety of the subject on the other, that had we no authority to support our views of the matter, we should hold it as one of the landworks of right which the legislature very seldom indeed, or Court of Law, never should overstep.

But have we before us a case like this, have we an offence created, a right taken away? in no wise; we have a Legislative enactment ordering that in all future trials, a certain class of persons, shall give evidence in one way instead of another way. The new Law does not make that evidence which was not evidence before; it does not make that an offence, which was not an offence before. It regulates the form of conveying evidence to the Judges, of fact, and no more; and right or wrong, the Ordinance enacts that on all future trials, such shall be the mode of conveying such evidence. The enactment is positive, and we fail to perceive how the prisoner could thereby be in any way prejudiced.

If an enactment made a contract, previously provable by writing alone, provable by parole evidence, the matter would be a very different one, and it could not justly be ordered against one who, at the time that he contracted, contracted within the four corners of his written contract; that something, besides the writing, must be brought forward against him. He might justly say: "*non hæc in fœdera.*" If the evidence of a wife, which could not in ordinary cases be tendered in a criminal Court, for or against her husband, was made legal evidence, it might perhaps be urged that such a law could not be applied to offences committed before the passing of the act. But here, the girl's evidence was legal evidence; the difference lies here, that, whereas prior to the Ordinance, she had to be sworn; she is heard, now, without an oath if the presiding Judge is satisfied that she is sufficient-

ly intelligent to answer the questions put to her.

What would have been the result, if the Ordinance had not been passed? Would the girl have been excluded, as it was contended? By no means; the trial would have been postponed until she had received religious instruction and been taught the solemnity of an oath. To avoid such postponements, girls of that description are heard upon their promise to speak the truth, as numbers of the Hindoo and Mussulman persuasions are daily heard before our Courts, not on oath, but on their solemn affirmation. The last Ordinance is of a comparatively recent date; it was never doubted since it passed, that as soon as it became law, it should be acted upon; and the new Ordinance touching children of a tender age, is of a precisely similar nature.

Of course the point not taken respecting the Hindoo and Mussulmans, might be, and was taken respecting the new Ordinance. But we cannot come to the conclusion that it should succeed. We cannot see that a new offence has been created, or extended; that a new kind of evidence which was not evidence, before, has been introduced; we cannot see that the prisoner is in the most remote degree prejudiced; for, before going to trial the prosecution would have had examined on the "voire dire," and if she did not satisfy the presiding Judge that she sufficiently well understood the nature of an oath, the case, as we have stated before, would have been postponed, and ultimately, the girl would have been heard.

Whilst, therefore, we must distinctly adhere to the principles which we have laid down in this Judgment, that neither for Civil contracts, nor for offences, can we give retrospective effect to an enactment which could prejudice those contracts, weaken or jeopardize them, extend to any degree those offences; yet, in this case, we find that the only change created by the Ordinance, so far as it relates to this case, touches the form of bringing in evidence which was evidence before, and that the legislature has in clear, unambiguous words, enacted that this should be done "in all trials" and that this law should operate from the 21st July 1866.

The second point urged by PELLEREAU is, that the girl did not understand the nature of a promise. We find that she answered the questions put to her, sensibly and well, and besides the CROWN had to satisfy on the facts, not this Court, but the presiding Judge that she had intelligence enough to be heard by the Jury. The Judge has allowed the evidence to go to the Jury, the Jury have believed that evidence, and have acted upon that evidence. This is a point which might be spoken to in connexion with the first, but upon which we cannot possibly form an opinion so satisfactory as that which the Judge and the Jury have arrived at.

Our Judgment is that PELLEREAU do take nothing by his motion.

SUPREME COURT.

ACTION EN DOMMAGES-INTÉRÊTS POUR MAUVAISE GESTION.

ACTION IN DAMAGES ON ACCOUNT OF MISMANAGEMENT OF A SUGAR ESTATE.

BLACKBURN,—Plaintiff,

Versus

THOMAS, LACHAMBRE & Co,—Defendants.

Before:

His Honor the CHIEF JUDGE, and

The Honorable Mr. JUSTICE BESTEL.

S. J. DOUGLAS,—Of Counsel for Plaintiff.
A. J. COLIN, —Plaintiff's Attorney.
HON. V. NAZ, —Of Counsel for Defendants.
W. HEWETSON,—Defendants' Attorney.

16*th October*, 1866.

This was an Action in damages, directed by the Plaintiff against the Defendants represented here by one Maroussem.

£10,000 or $50,000 damages are claimed.

The grievances alleged in support of such heavy damages are: 1o. Mal-administration on the part of the Defendants of the Estate "*Chamarel*" *alias* "*Les Nuages*," situate at Black River, and leased originally by the owner thereof, Dr. Amédée Perrot to Delissa and one Victor Lamarque, and subsequently held on lease by Delissa and the now Plaintiff, Blackburn. 2o. Such and administration having led to a non-payment of rent to the landlord, has compelled the latter to sue for and obtain the cancellation of the lease to the great damage of the Plaintiff.

The facts of the case are these:

By an agreement under private signatures of the 22nd Jan. 1864. the Defendants, through Maroussem, their Attorney in this Island, agreed to advance to the Plaintiff and Delissa, joint lessees of the Estate "*Chamarel*," a sum of $31,000 for the purpose of meeting their coming sugar crop of 1864 to 1865, which said sum was to be advanced in the manner and on the conditions in the agreement set forth, and for the repayment of which advances the lessees of "*Chamarel*" specially pledged all the sugars which should be made on the said estate, during

Crop ; the Defendants undertaking to deliver to Amédée Perrot, their Landlord, out of the sugars of that crop, for rent 160,000 lbs. weight of sugar.

The non performance by the Defendants, of their undertaking to deliver to the landlord the rent in kind of 160,000lbs. of sugar has led to the cancellation of the lease, to the great damage as alleged, of the Plaintiff.

By another agreement under private signatures between the Plaintiff Delissa, his co-lessee and the Defendants, and whilst the Plaintiff was lessee and Administrator of the said Estate "*Chamarel*" and in peaceful possession thereof, and whilst the said Estate was, as alleged, in good order and condition, and during the crop of 1864 and 1865, it was agreed that the Plaintiff should give up the administration of the Estate and that the Defendants should take the entire administration, agency and control of the said Estate, on the terms of the said agreement set forth, and amongt others, that they should supply the Estate with all the necessaries in money men, materials, and victuals and that they should pay the landlord's rent, &c., &c.

The breach of the duties undertaken by and entrusted to Defendants, the Plaintiff alleges to have been attended with the loss of the greatest part of the crop and of the advantages he expected te derive therefrom, as well as from the continuation of the lease which, nevertheless, has been cancelled, all which wrongs have been caused by the mal-administration of the Defendants, to the great damage of the Plaintiff ; for which wrongs (*viz* :) the cancellation of the lease and loss of the crop, the Plaintiff claims the compensation above stated of £50,000.

The Defendants denied the facts stated, the damages alleged and the right of Action on the part of the Plaintiff.

JUDGMENT.

How far has the Plaintiff proved the facts charged ?

The Defendants having made certain advances to the Plaintiff and co-lessee, Delissa, for the purposes in the opening of Credit above mentioned, and finding those advances endangered under the management of the Plaintiff who was in a state of complete hostility with Delissa, asked of the co-lessees that they should be allowed to manage the Estate.

Blackburn assented to the proposal ; and Delissa who had first given a verbal assent, to the same effect, subsequently refused to sign the written agreement of the 1st November 1864, embodying the conditions of the administration of the Estate by the Defendants.

In pursuance of his agreement, Blackburn, who, to that moment, had the management of the Estate, resigned the same in favor of the Defendants.

Upon this and at the request of Blackburn, one Genève who had been previously appointed to the management of the Estate by Blackburn and Delissa, on probation, was by the Defendants maintained in the administration of the Estate. A short time after, on notice to them by Blackburn, of the insufficiency of Genève to carry out the trust reposed in him, the Defendants not only immediately empowered Blackburn to discharge Genève, but lost no time in personally discharging the latter and restoring to Blackburn the administation of the Estate.

We are told that the crop had begun under Blackburn's administration,that the sugar-house, utensils, with the few repairs called for and which had been made by Blackburn, Mill, cattle, carts, were in good working order; canes properly cleaned, in good condition, and hands in sufficient number for making the crop.

That, no sooner had Genève assumed the management of the Estate, by order and on account of the Defendants, things had come to dead lock owing to the disordered state of the sugar-house, from want of cattle and fund, carts, men and provisions.

Neither of these descriptions of the state of things at *Chamarel* is strictly truer. The most reliable evidence in support of the true state of matters is the evidence of Aristide Lecordier, Manager ot the Hily's Estate, *Châteaufort*.

This witness thus speaks : "I was Manager of Hily's Estate at the time when Blackburn was in possession of *Chamarel*, in 1864. In August, September, October, November and December last year, I was in the habit of going to "*Chamarel*." I also used to go there every day whilst the *Châteaufort* canes were being manipulated at "*Chamarel*."

Hily's crop began in September, last year, and the Estate *Chamarel* did manipulate his canes during that very month and the ensuing month.

In October, last year, "*Chamarel*" was not very clean. It was not in a good condition. I remember Blackburn giving the administration of "*Chamarel*" to Genève, in November last. Hily's crop was resumed at "*Chamarel*," in December last, after Genève had been appointed Manager. It was finished in February, this year. Hily's crop was very badly done. In December last year, that is during Hily's crop at "*Chamarel* I saw no one in the sugar-house at "*Chamarel*" to look over the machinery. These machineries were left in a very bad condition, without any one for repairing them. There was not a sufficient quantity of animals. Nor were there a sufficient number of men. In my opinion, Genève's management was good, but he could not work, every thing being in complete disorder. When Blackburn began the crop, everything was going on pretty well at the beginning ; but when Genève was appointed Manager, *Chamarel* then began to be in a complete want of material, men, provisions for men and change of wetzells.

On cross-examination the witness says that state of things already existed at *Chamarel*, when Genève began to manage it. I remember the

day when Maroussem and Hewetson came on the Estate; on that day they were trying to make sugar but every thing was in pitiful state.

The Buénos-Ayres mules which had been just bought were at that time in a pitiful state.

The bullocks in bad condition, not a sufficient number of carts, and carts in a bad condition. No carpenter to repair them. This was so in November last.

On re-examination, the witness adds: "When Blackburn began the crop, things went pretty well, but under him they became worse. and under Genève worst of all.

During the time Blackburn was making Hily's crop, I always saw workmen whenever there was anything necessary to repair.

The next impartial witness though a great sufferer from the condition of the machinery and utensils of the sugar-house, condition and insufficiency of cattle and carts &c., is Dubreuil Hily, who, in 1864, had his canes manipulated at *Chamarel*. This witness informs us that in September 1864, the crop was begun on his land. That in September and at the beginning of the crop the machinery worked very well and was in good condition; but shortly afterwards required frequent repairs. Small repairs were frequently made. There were always workmen there to make these repairs. The battery leaked every two or three days. They were obliged to stop the leak. These repairs did not prevent the crop from going on. They interrupted the work for 2 or 3 hours to half a day. It would have been better to stop the crop and at once make a good repair.

I remember when Genève took the management of the Estate. It was in the beginning of November. Very often the crop was stopped; but not by the mill at that time but by other causes. In December, the machinery was already very bad. In November the machinery required repairs. I advised Genève to repair it at once. If those repairs had been made, machinery would have been in perfect condition. But these repairs not having been made, the machinery went working during the whole month of November and grew worse. Things went on badly in December and afterwards. The batteries ran like a stream. The bacs leaked. The first bac made of tin ran so much that they were obliged to put a cask underneath, in the cellar, to receive the contents that were running out. I affirm that in the month of November, all the repairs required by the machinery could have been made in eight days and I attribute the deterioration of the machinery to that want of repairs. One of the turbines was blown up. and all the turbines were deteriorated at the end of the crop, and I was obliged to send oil to work one of the two or three that remained, and at the end of the crop there was not one left.

The witness speaks of the insufficiency of carts and draught animals.

On cross-examination:—Of the sufficiency of Blackburn as a Planter, but as regards the sugar-house, says the witness, he left a good deal to be desired. Of Genève he says that he was a person who well understood the working of the sugar-house. He was placed on the estate of Blackburn and Delissa for a few days. I was of opinion, that time, it was better to have Genève as Manager than Blackburn. I said that to Blackburn. In October, Delissa sold me ten tons of Peruvian guano that were on the "*Chamarel*" Estate. He gave one a delivery order signed by himself and Blackburn. The latter refused delivery, saying he wanted money to pay for the engagement of men before the Magistrate; that he did not know what Delissa had done with the Bill given by me in payment of the guano, and that he would not run the risk of delivery until he knew where the money was.

The Witness speaks of the frequent quarrels of long duration between Blackburn and Delissa, of the distrust of each other on both sides and tells us that it is neither the interest or custom of Planters to sell guano advanced to them for their Estates.—It is sometimes sold when bad. I am quite sure, said Hily, on re-examination, that if things necessary had been sent, the crop, would have been saved; but during the month of November, December, January, and February nothing was sent, for the sugar, of that which was necessary.

If would be needless to go further into the merits of the evidence, in this case.

The passages selected from the evidence of Hily and his Manager, men wholly disinterested, well acquainted with the climate of *Chamarel*, fully able, not only as men but as Planters, to speak of the state of machinery, sugar-house, carts, cattle, number of men, conditions of the canes &a., fully shew that the state of things under Blackburn's administration was anything but satisfactory and that it became worse from day to day under Genève, from the fact of the Defendants not having supplied him with the necessary means to remedy the ill already existing during Blackburn's management.

In assuming the illegality of the contract between themselves and Blackburn, in the absence of Delissa, his joint lessee, this illegality cannot be set up in the defence of the Defendants who have participated in the illegality which might be attempted to be set up.

Whether Blackburn had or had not the right to entrust the management of the Estate, without the concurrence of his co-lessee, Delissa, it is nevertheless true, as a matter of fact, that he has so entrusted the management to the Defendants who have undertaken the management as to Blackburn at least. By so doing they have been the *negotiorum Gestores* of Blackburn, and as such, should have administered as *boni patres familiae*, and should not have allowed things to go to rack and ruin; a state of matters spoken to in most energetic language by Perrot, the landlord, whose evidence shews, from personal experience and outlay, the repairs required would not have exceeded the sum by him men-

tioned (viz :) which outlay, would have saved the machinery, preserved the mill, and permitted the saving of the crop, payment of the landlord's rent, and allowed the lessees the continued enjoyment of their lease.

Of all these advantages, the Plaintiff has been deprived, through the mismanagement of the defendants. It is true that the dissentions between co-lessees have cramped the movement of the Defendants in the satisfactorily working of the estate of *Chamarel*. But the Defendants were fully aware of the misunderstanding existing between Blackburn and Delissa.

The refusal of Delissa to join Blackburn in entrusting to the Defendants the administration of *Chamarel* was of itself, a sufficient warning of the dangers to which they were exposing themselves by their acceptance of the mandate entrusted to them by one of the colessees only ; with the view, however, of protecting their personal interest, they have accepted and acted upon the power of management given by Blackburn who, now, calls upon them to indemnify him for the wrong personally sustained by him.

This, in the opinion of the Court, the Plaintiff is fully entitled to do.

The only difficulty, on the part of the Court, is the Assignment of the damages. The quantum of the damages claimed £10,000, appears to the Court too high, especially in presence of the large sums of money advanced to the lessees of the Estate ; leaving against the Estate a balance of $28,976.93c., which, probably will be a dead loss for the Defendants, under the Plaintiff's present circumstances. The difficulties thrown in the way of the Defendants in the management of the Estate by the misunderstanding between the co-lessees must not be lost sight of in appreciating the mal-administration of Defendants. However, willing to do the best, to protect the interest of all parties concerned, those efforts were partially rendered abortive by the opposition thrown in their way by the co lessee, Delissa.

These several circumstances, duly considered, lead the Court to the awarding to Plaintiff the sum of £1,200 damages, with costs of suit.

SUPREME COURT.

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SUCCESSIONS IRRÉGULIÈRES, — ENFANTS NATURELS,—PETITS ENFANTS NATURELS.

—

IRREGULAR SUCCESSIONS,—NATURAL CHILDREN, AND NATURAL GRAND CHILDREN.

—

L'AMIRAL & ORS,—Plaintiffs,

Versus

PONDART & WIFE,—Defendants.

—

Before :

His Honor Mr. JUSTICE BESTEL,
His Honor Mr. JUSTICE COLIN.

—

17*th October*, 1866.

This special case demands of the Court to decide whether the natural grand child of a natural child deceased before his or her natural father or mother is entitled to any share in the succession of his or her grand father or mother.

Any doubt which might have been entertained, hitherto, on this point, must be dismissed from our mind, in presence of the Judgment of this Court in the case of *Virginie Bruneau* v. *The Government of Mauritius*. (see PISTON'S REPORTS, 1864 page 9 &a.,) affirmed as it has been by HER MAJESTY in Her Privy Council, on the 18th June 1866.

Amending the clerical error referred to in the special case, Pondart the wife is sent into possession of the limted share accruing to her in the Estate of her grand mother Marie Gertrude, as a natural grand child, and no more.

SUPREME COURT.

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SUCCESSIONS IRRÉGULIÈRES,—ENFANS NATURELS, —PETITS-ENFANTS LÉGITIMES ET NATURELS,— DROIT DE REPRÉSENTATION.

SUCCESSION,—NATURAL CHILDREN—LEGITIMATE AND NATURAL GRAND CHILDREN,—RIGHT OF REPRESENTATION.

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HARDOUIN AND ORS ,—Plaintiffs.

versus

FRÉDÉRIC AND ORS.,—Defendants.

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Before :

His Honor the CHIEF JUDGE and
His Honor Mr. JUSTICE BESTEL

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17*th October* 1866.

This matter was originally brought before a Juge at Chambers.

One of the interested parties, anxious to be sent into possession of his rights in the Estate of the late Henriette Jouan, who died after having made a last Will and Testament and appointed executors, of the existence of which Will he appeared to have been ignorant, obtained an Order from one of the Judges, at Chambers, to send the Curator into possession of the alleged unadministered Estate of the said Henriette Jouan.

Informed of the Order sending the Curator into possession, the successors and representatives of the said Henriette Jouan, applied at Chambers to be let into possession of her Estate.

This Application was objected to by LECLEZIO, on behalf of the Curator, who doubted the powers of the Judge at Chambers to send the Applicants into possession of an administered Estate.

The words of the schedule of the Chamber Ordinance are: "Application to be let into "possession of the *unadministered*, property and "rights of a party deceased or absent." In the case, said LECLEZIO, the Estate of the late Henriette Jouan was not unadministered, the Curator having been seized with the administration thereof, from the date of the Order sending him into possession of the Estate of the deceased.

On that objection, parties were referred to the full Court, and parties fully heard, the Court took time to consider and now proceeds to deliver its Judgment.

JUDGMENT.

Henriette Jouan, in her life time (*viz*: on the 18th March 1846,) made her Will before a Notary, in due form of law, and died on the 18th June 1862. The testatrix thus expressed herself: "Je "déclare *n'avoir pas de parents légitimes*, n'avoir "jamais été mariée, et ne laisser, comme ayant "droit à ma succession, que des *enfants naturels* "ou *leurs enfants légitimes*, ainsi qu'il sera ci-"après expliqué:

"J'avais sept enfants. Deux d'entre eux sont "décédés.—Gracilie, Antoine et Hubert Har-"douin laissent: ce dernier, des *enfants légitimes*, "et Gracilie des *enfants naturels*," to whom certain legacies are made by the testatrix, thus placing her *natural* grand children on a level with her legitimate grand children, not only in her affections, but in their pecuniary rights and interest.

The only point worthy of any serious consideration in this case is, whether a natural grandchild can, by *representation* of his or her *natural father* or mother, or in his or her own right, take any share in the succession of his or her *natural* grand father or mother.

The legitimate descendents of Henriette Jouan, having raised no opposition to the distribution of her Estate amongst themselves and her natural descendants, we see no reason for not sanctioning such distribution, on the part of the Testatrix, and we, accordingly, send the Applicants into possesion of their respective rights as natural children and no more; and we do so the more readily, on the authority of the case of *Virginie Bruneau* v *the Government of Mauritius*, (see Piston's Reports 1864, page 9, &a.), affirmed by HER MAJESTY in Her Privy Council, on the 17th June 1866; and we do further order that the Curator of Intestate Estates do deliver to them possession of the Estate of the late Henriette Jouan, the administration of which has been confided to him.

The costs and expenses incurred by the Curator to be paid to him, out of the Estate of the said Henriette Jouan.

SUPREME COURT.

PORTIONS DE TERRE RÉUNIES EN UNE SEULE ET MÊME EXPLOITATION,—RÉSOLUTION DE VENTE,—MARRE,—CANAL,—MOULIN A EAU ET USINE,—SERVITUDE,—DESTINATION DU PÈRE DE FAMILLE,—PRÉSOMPTIONS QUANT AUX DROITS DE PROPRIÉTÉ SUR L'EAU,—C.C. ARTS. 692, 693 ET 694.

L'eau est l'accessoire d'un moulin et est présumée appartenir au propriétaire de ce moulin; et lorsqu'un moulin aura été érigé par les propriétaires du fonds et que ce fonds aura été ensuite morcelé et vendu à différens propriétaires, s'il n'y a pas de stipulation expresse, l'eau sera considérée comme faisant partie du moulin, et une servitude sera établie.

PORTIONS OF GROUND UNITED INTO ONE SINGLE ESTATE,—CANCELLATION OF SALE,—POOL OF WATER,—CANAL,—WATER-MILL AND SUGAR-HOUSE,—EASEMENT,—"DESTINATION DU PÈRE DE FAMILLE,"—PRESUMPTIONS AS TO OWNERSHIP OF WATER,—C.C. ARTS. 692, 693 AND 694.

The water is an accessory to a mill and is presumed to belong to the proprietor of the mill; and where a mill has been erected by the proprietor of the land and the land is afterwards sold to different proprietors, if there is no express stipulation, the water will be with the mill, and a servitude will be established.

DESENNE,—Plaintiff.

versus

EV. PILOT & CIE,—Defendants.

Before:

His Honor THE CHIEF JUDGE, and
His Honor MR. JUSTICE COLIN.

L. Rouillard,—Of Counsel for Plaintiff.
H. Bertin, —Plaintiff's Attorney.
J. Colin, —Of Counsel for Defendants.
E. Boullé, —Defendants' Attorney.

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16*th October* 1866.

In this case, the Plaintiff set forth that he is the proprietor of a piece of land in the District of Moka, of about 77 acres in extent, on which there is a certain "Marre," a pool of water, his exclusive property. That the Defendants illegally and without any title have caused to be diverted into a certain canal, dug upon the Plaintiff's property, the water of the said "Marre" and caused it to be conveyed by the said canal, for the use of the Sugar-House of their property called "*L'Emma*." That the Defendants have caused great loss and damage to the Plaintiff by depriving him of the exclusive ownership, quiet and peaceful possession and enjoyment of his land and of the said water; and the Plaintiff asked the Court to shut up the canal and restore to him the peaceful enjoyment and possession of his land and water.

The case was originally brought in the Bail Court, but was remitted by the learned Judge to the Supreme Court.

The Defendants, at the outset, pleaded that the case was not within the competence of the Supreme Court, as the "Marre" was not private property, and that the application should have been made to the Executive Council of the Colony, sitting as a Land Court for the apportionment of the water among the neighbouring proprietors; but the plea was not pressed.

On the merits, the Defendants alleged that the run of water in question was an appurtenance, dependency or servitude of their Estate "*L'Emma*" and was, by destination, one of the dependencies and beneficial servitudes of the said Estate and is now their property. That the canal had been formed by the former owners of the land, long before either of the parties to the present suit had acquired their land; and the water was always used by the former proprietors as it is now used, and was the property of the Defendants.

The facts of the case are somewhat special, they may be thus stated:

The Estate "*Ripailles*," in the District of Moka, and measuring some 630 acres, or thereabouts, formerly belonged in indivision: one half to Mr Numa Geffroy, and the other half to the family Lionnet, consisting of 4 persons: Aristide, Félix, Théophile and Mrs. Desenne, who inherited from their mother, on the 1st November 1859. Mr Target surveyed the ground and made a division in kind between Geffroy, on the one hand, and the Lionnets on the other. This survey was only closed on 10th April 1860. On the 5th June 1859, Geffroy sold his half of the lands to Aristide Lionnet and Charles Laborde, Attorney at law, and brother in law of Lionnet, and Madame Rey a sister of Laborde, for the sum of $15,000 payable by certain instalments as covenanted between the parties.

The whole Estate was reunited in 1859 by the proprietors, for the purpose of a sugar plantation; canes were planted and a sugar-house with machinery was erected. One of the parties, Théophile Lionnet, has deposed that the operation was contemplated as promising to afford to "our family wealth and not to sell it "after its creation." It was "une affaire de "famille."

The arrangement among the parties declares (Art. 2) that: "aujourd'hui les propriétaires des "dites deux parties de terre voulant les réunir "comme elles étaient jadis, ayant le partage fait "avec le sieur Numa Geffroy, de façon à ce "qu'elles ne forment plus qu'une seule et même "proprieté, ont arrêté par les présentes que les "dites deux portions de terre sont réunies en "une seule et même propriété sous le nom de "*Ripailles*."

The interests or shares of the parties were arranged as follows: one sixth to Madame Rey; a sixth to Mrs. Laborde; one sixth to Théophile Lionnet; one sixth to Félix Lionnet; and two sixths to Aristide Lionnet.

To supply water for the sugar house and mill, a canal was cut, in the year 1860, from the "Marre" in question. The witnesses tell us that it would have been very difficult, if not impossible, to find the necessary supply of water elsewhere. This is the canal now in question.

The sale price not being paid, Geffroy, in the year 1863, obtained a resolution of the sale made by him of his share of "*Ripailles*" to Aristide Lionnet and others. The Judgment of the Court authorized him to take back his lands and to keep, as damages, all the improvements and "améliorations" generally whatever, whether in buildings machinery, plantations, beasts of burden and implements of husbandry, made or placed on the portion of land by him sold as aforesaid, with costs of suit. The machinery of the sugar-mill and certain accessories thereof which had been supplied by Messrs. J. & J. Brodie and had not been paid for were excepted. The unpaid vendors were found entitled to remove those articles; Geffroy, then, sold to Langlois, who sold to Paillotte, and he, in his turn, sold to the Defendants, Pilot & Company. The sugar-house and mill have, along, been supplied with water from the canal, and have now ceased to work as by an arrangement with the Messrs. Brodie, the machinery of the sugar-mill was allowed to remain in the sugar-house.

The heirs Lionnet received possession of their part of the Estate. Their portions were determined in the usual way, by casting lots before a Notary, on 19th December 1863. The share falling to Félix Lionnet was the one on which the "Marre" or pool was situated, and thro' which the canal or water course in question passed on its way to the sugar-house on the land originally the property of Mr. Geffroy, and now, as we have seen, of the Defendants. Félix Lionnet was ejected by "expropriation forcée," in 1864.

The lot was bought by Numa Paillotte. He was ejected by "Folle enchère," the following year, for not paying his price. The Hon. Henry Pitot bought the land and sold it, on the sixth September 1865, to the Plaintiff, Desenne.

L. ROUILLARD, for Plaintiff, recites the facts and the dates. The cancellation of the sale by Geffroy swept away the persons who bought from him. They must be held as never being proprietors. Félix Lionnet after he got his share of the one half of the lands allotted to him, was ejected by "*Expropriation forcée.*" He never was proprietor of any other part of the Estate, which was never held, at one time, by the same proprietors. So the principle of "*destination du père de famille*" don't apply. DEMOLOMBE V. XII. § 804. There can be no right of servitude, except when the Estate has been severed, and the servitude extends over one portion in favor of the other. C. C. 637. 1,183. 2,125.—DALLOZ. Servitude. No. 1.014.—DURANTON V. No. 568. —TOUILLIER. 2. No. 614.—DEMOLOMBE. Servitude, II. No. 12.

J. COLIN, for Defendants: The whole lands were united into one Estate when the mill was built. It would have never been erected at the spot, except there had been this supply of water. No mill can exist without water, and, in law, the water is always an accessory of the mill and goes with it. PROUDHON. Domaine Public. V. 3, page 428.

The Judgment of cancellation restored the lands to Geffroy, with all the improvements and "améliorations" which had been added, including the mill and its accessories. Such as the water in question. The part of the machinery being restored to Brodie, the unpaid vendor, is immaterial. In fact, the machinery never was removed, as Brodie has settled with for the price.

As to the difficulty alleged, on the other side, that a servitude implies two distinct landed Estates, that is generally true, but the facts here are not unconsistent with the existence of a servitude § 32. 2-87 : S. 54. 1. 682.

L. ROUILLARD, in reply: The other side do not indicate distinctly what legal title or right they are to stand upon. It may be true that all the parties joined in a partnership for working the Estate, but that don't make them proprietors, and if they were not so the principle of "*destination du père de famille*" don't apply. Félix Lionnet was no party to the cancellation of sale by Geffroy, and his rights or interests could not be affected by it.

THE COURT.

The real question between parties in this case, is the right to the run of water which supplies the mill and sugar-house of the Defendants with that indispensable article. Looking at the circumstances of the case, as they have now been established in evidence, we have to determine if the Plaintiff has made out his case.

We say if the Plaintiff has made out his case; for, not only does the Plaintiff in this as in most other suits lie under the obligation of establishing his right before he can eject the Defendant from the possession of the subject in dispute, but the matter about which the contention has here arisen, is one of a very peculiar nature, viz: the run of water attached to a mill and sugar house. To such establishments the supply of water is indispensable. This is very well stated by Mr. PROUDHON, in his "Traité du domaine public," vol. 3, page 428 : "Ici la cause du meunier se présente sous un tout autre aspect ; car on doit, jusqu'à la preuve contraire, considérer le canal comme lui appartenant exclusivement, soit quant au sol du fonds, soit quant aux bords contenant les eaux ; attendu que, comme le dit HENRY, "le moulin ne pourrait exister sans "prise d'eau ; le canal qui lui porte sa force mo- "trice doit être réputé partie intégrante de l'u- "sine, puisqu'il lui donne la vie, et qu'il en "constitue réellement la partie essentielle."

These words *mutatis mutandis*, are equally applicable in Mauritius as in France.

The water in question, here, is essentially a part of the mill and sugar-house. We know that the building never would have been erected where they stand, on the land which now belongs to the Defendants, if the water has not been there ready to be turned to account and applied for the purposes of the sugar-establishment thereon erected. The water, as part of the mill, is presumed to belong to the proprietor of the mill "*jusqu'à la preuve contraire.*" But what proof does the Plaintiff offer that the water is his ? He says : it rises in my ground and it runs through my ground. Now, strong as the presumption would be in his favor in ordinary circumstances, that presumption would yield to stronger presumption, that the water supplying the mill must go with the mill as an accessory, but the evidence enabled us to trace completely the history of the water and the canal in which it runs, and the Defendant would, we think, be able to establish his right to it, on the other ground of law.

By articles 692, 693 and 694 of the CODE CIVIL, it is enacted as follows :

"Art. (692) La destination du père de famille "vaut titre à l'égard des servitudes continues "et apparentes."

"(693.) Il n'y a destination du père de fa- "famille que lorsqu'il est prouvé que les deux "fonds actuellement divisés ont appartenu au "même propriétaire, et que c'est par lui que "les choses ont été mises dans l'état duquel ré- "sulte la servitude."

"(694.) Si le propriétaire de deux héritages "entre lesquels il existe un signe apparent de "servitude dispose de l'un des héritages sans "que le contrat contienne aucune convention "relative à la servitude, elle continue d'exister "activement ou passivement en faveur des fonds "aliénés"

Now, we know that the water-course in question was made for the supply of the mill when the lands were all reunited by the Lionnet fa-

mily, and certain relations of theirs, into one property, for the common benefit.

So, here, we have a " destination du père de famille " and the articles of the Law above quoted would establish the right of the Defendants. No doubt, it was agreed at the bar, that the same parties were not absolutely the proprietors of both sections of the lands originally forming the Estate " *Ripailles* " when the sugar-house was erected and the canal excavated, but it will be remembered that all parties having right to any portion of the lands had agreed to reunite the whole lands, as they had originally been joined in one Estate for the common behoof and in certain fixed shares, " de façon à ce " qu'elles ne forment plus qu'une seule et même " propriété." Although, therefore, Félix Lionnet, the owner of a share of one half of the Estate, did not join in the purchase of the other half, from Geffroy, it is difficult to see how the creation of the mill with its accessories was not the act of the whole proprietors of the Estate, seeing that he and all the other persons interested in the sections of the lands, had formally agreed to unite them, as above mentioned, into one Sugar-Estate, for the common behoof.

The opinon of the Court being thus in favor of the Defendants, on the ground just stated, it is unnecessary to go into the other arguments pressed by their Counsel. Much was said of the fact that the Judgment of cancellation of sale granted in favor of Geffroy, in the year 1862, declaring that he should keep as damages all improvements and " améliorations" generally which had been made on his property, would include the sugar-house and its accessory, the run of water in question. This is quite true, but as Félix Lionnet was not a party to that suit, the Judgment cannot be held to be binding on him or on those who, now, represent him. But it is unnecessary to go farther into that matter.

THE COURT, therefore, finds that the Plaintiff has failed to make good his case and that the Defendants have established a right of servitude of the water and water-course or canal in question, as against the Plaintiff and their lands.

Cost to Defendants.

SUPREME COURT.

RÉSOLUTION DE VENTE,—CRÉANCIERS,—TIERCE OPPOSITION, — HUISSIER,—FAUSSE DÉCLARATION,—C. C. ART. 1654,—C. C. P. ART. 474.

Un Jugement prononçant résolution de vente d'un Immeuble ne peut être attaqué par voie de " tierce opposition," par un Créancier de l'Acquéreur, à moins qu'il ne prouve qu'il y a eu collusion et fraude entre le vendeur et l'acquéreur ; en cas ordinaire ce Créancier doit intervenir lorsque l'action en résolution est pendante.

CANCELLATION OF SALE,—CREDITORS,—" TIERCE OPPOSITION," — USHER,—ALLEGED PRECONCERTED FRAUD,—C. C. ART. 1654,—C. C. P. ART. 474.

A Judgment of cancellation of the sale of an Immoveable Property cannot be challenged by way of tierce opposition, by a Creditor of the Purchaser, except when he proves that there has been preconcerted fraud between the purchaser and vendor ; in ordinary cases the Creditor ought to have intervened in the Action of Cancellation when the same was pending.

THE CEYLON COMPANY LIMITED,—Plaintiffs,

Versus

V. PRAGASSA AND ORS.,—Defendants.

Before :

His Honor Mr. JUSTICE BESTEL and
His Honor Mr. JUSTICE COLIN.

HON. V. NAZ, —Of Counsel for Plaintiffs.
W. HEWETSON,—Plaintiffs' Attorney.
L. ROUILLARD, —Of Counsel for Defendants.
V. PRAGASSA, —Attorney for Defendants.

16*th October* 1866.

By a Notarial deed drawn up before Mr. Pelte and his colleague, of the 12th July 1858, Aristide de Roquefeuil Labistour and wife made to Pragassa, one of the Defendants in this cause, in consideration of the sum of £12,000, the assignment of a certain quantity of sugars. " Quatre " cents milliers de sucre de vesou de 1ère qualité, " (wetzellé et turbiné) poids net, fabriqué à l'u- " sine de la propriété *Bon Accueil*, située au " quartier de la Savane, appartenant à Madame " Zélie de Lacourtodière, Veuve de Monsieur " Louis Auguste Prudhomme Duhaucourt, livra- " ble, par cette dernière " in the manner and under the conditions set forth in the assignment.

The 400,000 lbs. of sugars aforesaid were a part and parcel of a larger amount, *viz.* : 600,000 lbs. of sugars, being the price of the Estate *Providence*, at Savanne, sold by Labistour and wife to the said widow Prudhomme Duhancourt.

A Notarial agreement, between Pragassa and Aristide Prudhomme Duhancourt, before Gimel and his colleague, of the 9th January 1861, informs us, 1st. of the sale by the said widow Prudhomme Duhancourt of the Estates *Bon Accueil* and *Providence* to Aristide Prudhomme Duhancourt, who undertakes to fulfil as to *Providence*, the conditions above stipulated between Labistour and wife and the said widow Prudhomme Duhancourt.

The agreement, next informs us of the conversion of the 400,000 lbs. of sugars into a sum of $18,000 payable at the dates and under the conditions in the agreement mentioned.

By a Notarial acquittance before Notary Gimel and his colleague, of the 18th January 1861, Pragassa acknowledges having received from and with the personal monies of Mrs. A. Prudhomme Duhancourt, and with the authorization of her husband, in part payment of the said sum of $18,000 the sum of $9,000. Whereupon Pragassa assigned to the said Mrs. Aristide Prudhomme Duhancourt, his rights up to the amount so paid and received by him, on the said Estate *Providence*.

On the 28th March 1866, Pragassa caused a notice to be served upon the widow Prudhomme Duhancourt, calling upon her to deliver the 200,000 lbs. of vesou-sugar, the balance due to him after the above assignment, to Mrs. Aristide Prudhomme Duhancourt. This notice remained ineffectual. Whereupon, Pragassa, as holder of the rights of Labistour and wife, filed a Declaration in cancellation against widow Prudhomme Duhancourt, Aristide Prudhomme Duhancourt and wife. Parties not having pleaded to the Declaration, a *Rule Nisi* was taken out, calling upon them to shew cause why Judgment should not be signed against them for want of a Plea. On the return day, 25th April 1866, no one appearing for the Defendants, the Rule was made absolute. The cancellation of the original sale by Labistour and wife to widow Prudhomme Duhancourt was decreed in favor of Pragassa who was put in possession of the Estate "*Providence*," on the 23rd June 1866.

On the 26th June 1866, by a deed before Notary Vincent Geffroy and his colleague; Pragassa sold the said Estate "*Providence*" to Emile Pipon, on the condition that the latter, as purchaser, do carry out the sale by Licitation of the said Estate between Mrs. Aristide Prudhomme Duhancourt and himself, Pragassa, of which the preliminary formalities had been begun by him, within the week from the date of the Rule of Cancellation, as ordered by such Rule and with the full knowledge and assent of the "Ceylon Company" made, by Pragassa, a party to the licitation, as apparent mortgage creditor of the widow Prudhomme Duhancourt and Mrs. Aristide Prudhomme Duhancourt.

By a Notice served, on the 9th July 1866, by the "Ceylon Company" alleging themselves to be creditors of Mrs. widow Prudhomme Duhancourt and the now widow Aristide Prudhomme Duhancourt, on Pragassa, Pipon, widow Prudhomme Duhancourt and the now widow Aristide Prudhomme Duhancourt, the "Ceylon Company" summoned those several parties to shew cause why they, the "Ceylon Company Limited," should not be admitted as *tiers opposants* against the aforesaid Rule or Judgment of cancellation of the sale to widow Prudhomme Duhancourt by Labistour and wife, of the Estate "*Providence*" and also all other Rules or Judgments connected with or consequent upon such Rule or Judgment of cancellation.

On the 7th September instant, parties were respectively heard: Hon. V. Naz. for the Plaintiffs, moving as above; Hon. H. Kœnig, for Pipon; L. Rouillard, for Pragassa; J. Colin, for the widow Aristide Prudhomme Duhancourt, shewed cause.

In support of the motion, two affidavits were read by Hon. Naz. The Affidavit of John Henry Mercier, Manager of the Branch of the "Ceylon Company," at Port Louis, states as follow: That on or about the 23rd day of June 1866, I was informed that the certificate service of a certain *Rule Nisi* issued on the 16th April 1866, in a cause, then pending, between Volcy Pragassa as Plaintiff, and widow Prudhomme Duhancourt and others, Defendants, was false and illegal in as much as the said certificate mentioned that the service of the said Rule has been made on A. Prudhomme and his wife personally, in Touraine street, Port Louis, on the 13th day of April in the said year 1866, when, in fact, no such service ever took place, the said A. Prudhomme being then on his death bed, on the Estate *Providence*, in the District of Savanne, and his wife being in attendance on him. That immediately upon receiving the above information I gave instructions to the attorney of the "Ceylon Company Limited" to take the necessary steps to upset all the proceedings granted upon the said certificate of service, which proceedings I had, until then, believed to have been made regularly and *bona fide*.

Aristide Bertrand's affidavit states that from the 11th April last, up to the day of his death, A. Prudhomme could leave neither his room nor bed. That the Deponent had been constantly in attendance on A. Prudhomme, from the 27th April to the day of his death, during which whole time his wife never absented herself from her husband's room, except at rare intervals and during a few minutes at each time; and yet, said Naz, the usher's return states the service of the rule *Nisi* on Mr. and Mrs Aristide Prudhomme Duhancourt, to have been personal, as well as on Mrs. Widow Prudhomme Duhancourt.

Upon such alleged personal service, the Court made the Rule *Nisi* absolute in favor of Pragassa, the Assignee of Labistour and wife, and decreed the cancellation of the sale made by the latter to Mrs. Widow Prudhomme Duhancourt.

This Judgment based, as it is, upon a false return of the officer of the Court, is necessarily bad, cannot and ought not to be supported by the Court, to the prejudice of the rights of so large a creditor as the "Ceylon Company."

No subsequent ratification, if any, on the part of Mrs. A. Prudhomme, can cure so radical a vice in the service, and assuming the possibility of any such ratification on the part of Mrs A. Prudhomme, it should nevertheless, be confined to cases in no wise endangering the rights of third parties such as those of the creditors of Mrs. Widow Prudhomme Duhancourt and Mrs A. Prudhomme Duhancourt, otherwise the rights of the most legitimate creditors, such as those of the "Ceylon Company" might and would be endangered by collusion between vendor and vendee, as in this cause.

On an attempt by Naz to obtain the personal answers of Pragassa, Kœnig objected and rested his objection chiefly on the absence of right, on the part of the "Ceylon Company," to upset a Judgment duly made between the parties in the original cause, executed not only between parties, but even by the "Ceylon Company."

The allegation of fraud by the "Ceylon Company" in support of their right of interference can afford the Company no assistance.

There is no doubt that a creditor can exercise the rights and actions of his debtor, with the exception, however, of those rights exclusively attached to the person of the debtor. (Art. 1166.) It is equally true that a creditor may, in his personal name, impeach the acts made or done by his debtor, in fraud of his rights. (Article 1,169 C. C.)

But, to be allowed to do so, some strong presumptions should be laid before the Court, to warrant, on its part, the interference of the probable existence of a fraud.

And, no such presumptions have been shewn, in the present instance; allegations have been made, it is true, and these allegations I now undertake, said Kœnig, to shew, are contradicted by the facts of the demand in cancellation.

The Plaintiff Pragassa, as holder of the original vendors of "*Providence*," being unpaid by Mrs. widow Prudhomme Duhancourt, the purchaser of that Estate, sued for a cancellation of the original sale. Against whom was his action to be directed? necessarily against Mrs. widow Prudhomme Duhancourt, his debtor, and Mr and Mrs. Aristide Prudhomme Duhancourt. He was not bound to ascertain whether such vendees had conferred on other parties any right on the Estate sought to be recovered; and if any to make them parties to the action in cancellation. No law lays upon him any such obligation.

Directing his action against the widow Prudhomme, Mr. and Mrs. A. Prudhomme, without any notice of such action to the "Ceylon Company" or any other of their creditors, betrays not, on the part of Pragassa, the slightest intention of defrauding the rights of the "Ceylon Company" or of any other creditor.

But, it has been said that had the service of the Rule *Nisi* been good, the Judgment or Rule of cancellation would have been unimpeachable; but the badness of the service laid the Judgment open to the criticism of the creditors. What had Pragassa to do with the faulty return of the Usher? Is the ignorance or dereliction, by the Usher, of his duties, to be construed into a connivance by and between Pragassa and the Defendants, to defraud the creditors of the latter.

Further, either the action in cancellatian was to be directed by Pragassa against the creditors of the Prudhomme Duhancourt as well as against the latter or not;

In the first place, the "Ceylon Company" might justly move for the setting aside of the Judgment given, as contrary to Law.

In the second case, the creditors are without right to complain of the irregularity of the service of the Rule on Pragassa's debtors and of the Judgment obtained against them upon that service.

The Rule of Law on *Tierce opposition* is this: "Une partie peut former tierce opposition à un "Jugement qui préjudicie à ses droits, et lors "duquel *ni elle ni ceux qu'elle représente* n'ont été "appelés." (Art. 474, Code Proc: Civil.)

That the rights of the "Ceylon Company" may be affected by the Judgment in cancellation given in their absence, may be assumed. This probable result, however is insufficient to allow the "Ceylon Company" seeking to invalidate such Judgment. That they should have a right to do so they must shew that they ought to have been made a party to the action in cancellation and that they were not made parties to the same.

This, we have shewn, was not required, and if required, our answer is that they have been duly represented by their debtors, the Defendants to the action in cancellation. If so, what right have they to find fault with the Judgment, and what becomes of the repeated allegations of fraud on the part of Pragassa as well as on the parts of the Defendant to the action in cancellation.

That there was none, on the part of Mrs. Widow Prudhomme, is evident from the fact of her having resorted to a "Requête Civile" for the purpose of setting aside the Judgment in cancellation. As to Mrs. A. Prud'homme, her affidavit tells us that she and her husband were fully aware of the action brought, and that having nothing to say in bar thereof, her husband, in his life time, had intimated to the Attorney not to incur needless costs in resisting so well grounded a demand as that of Pragassa, in cancellation.

That the husband and wife, Aristide Prud'homme, were entitled to adopt a similar course, said Colin, is apparent; for, the nullity, in an act of procedure, is personal to the party on whom it is served, and which none of his creditors have a right to set up. (Article 1166, C. C.)

The fact of her having pledged the Estate *Providence* to the "Ceylon Company," in guarantee of the advances made to Mrs. widow Prud'homme Duhancourt, up to the amount of her interest therein, that is $9,000, is in nowise affected by her subsequent recognition of Pragassa's right to the cancellation demanded by him.

This cancellation, in nowise, legally affects the guarantee given to the Company by Mrs. A. Prud'homme. The Company will exercise any right they may have against her on the portion accruing to Mrs. A. Prud'homme Duhancourt, in the sale price of the Estate, on the Licitation to which they have been made parties, and to which they have not objected.

G. Guibert, for the widow Prud'homme Duhancourt, merely observed that his client denied the existence of any personal service on her, of the Declaration in cancellation and of the Rule,

JUDGMENT.

There is no doubt, as enacted by Article 474, C. P. C., that any party, creditor and others, whose rights are prejudiced by any Judgment to which he was not made a party, whether in person or by his representative, is entitled to the remedy of "*Tierce opposition*" for remedying the evil caused by such "*exparte*" Judgment.

In order that the Ceylon Company should be allowed such remedy, we must inquire first, whether their presence in the case of cancellation and Judgment thereon was required by Law.

Art. 1,654 C. C. says:

"Si l'acheteur ne paie pas son prix, le vendeur "peut demander la résolution de la vente." Against whom? Necessarily against the purchaser. No where is it said that the unpaid vendor shall serve notice of his demand in cancellation upon the creditors of the purchaser. And we see no reason why he should be subjected to such an unusual course of proceeding. If the purchaser has mortgaged the estate sold to him before paying his purchase price, the wrong sustained by his creditors are their own act and deed. Before parting with their monies, upon such security, the lenders might have enquired whether the estate was in any way encumbered, and more especially whether the Vendor's privilege had been extinguished by payment of the sale price. Is the vendor to be debarred the exercise of his right of resolution of sale because of the laches of money lenders?

These must have known what was the right of the vendor, in default of payment of the purchase price, and what were the effect of the exercise of such a right, (*viz*:) the doing away with any mortgage right which might be conferred upon them by the purchaser.

There are two modes to be resorted to by creditors, for the protection of their rights, in such a case:

Either by intervening in the cause, on the demand of cancellation, or by payment of the sum remaining due, on the purchase price giving rise to the demand in resolution.

That such is the ordinary mode of proceeding is not denied by the "Ceylon Company." But on the allegation of preconcerted fraud between the parties to the Judgment, such fraud arising from the alleged badness of the service of the Rule *Nisi*, the "Ceylon Company" wish to protect themselves agaist the possibility of a loss.

Assuming the badness of such service; this, of itself, is not such a presumption as to lead the Court, necessarily, to infer the existence of a culpable understanding between the vendor and the vendee, for the purpose of defrauding the Company of its lawful claims on the Defendants or on that portion of the price hereafter to accrue to Mrs. A. Prudhomme Duhancourt.

The fact of the Company having had notice of the Judgment, by their being made parties to the licitation ordered by the Judgment; and the subsequent fact of their not having objected to the licitation prayed for, necessarily show how little the parties to the Judgment now complained of ever contemplated defrauding the "Ceylon Company" of its lawful rights.

The prayer of the "Ceylon Company" to be allowed to adduce evidence of the alleged fraud between the parties to the Judgment of cancellation of the sale of "*Providence*" must therefore be and is accordinly refused on the following grounds: 1st, that in assuming the badness of the service referred to, yet, the law not requiring from Pragassa or any other unpaid vendor any notice to the creditors of his purchaser, of his action, the "Ceylon Company" cannot avail themselves of it for the purpose of upsetting the Judgment complained of by them.

2ndly. Because the "Ceylon Company," in default of the Estate, are entitled to that portion of the sale price which shall accrue to Mrs. A. Prudhomme, at the licitation of "*Providence*," to which they have been made a party and to which licitation they have not objected.

We record the real tenders made to Pragass and Pipon by the "Ceylon Company" (Limited), as also Pipon's readiness to deposit the sum claimed by the "Ceylon Company" (Limited).

Costs against the "Ceylon Company" (Limited).

COURT OF ASSIZES.

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TENTATIVE DE VOL,—PROCÉDURE CRIMINELLE.

L'Acte d'Accusation n'ayant point dit à qui appartenaient les objets volés, a été jugé défectueux, et la procédure faite à cette occasion annullée.

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ATTEMPT AT LARCENY,—CRIMINAL PROCEEDINGS,—MOTION IN ARREST OF JUDGMENT.

A Criminal Information held defective and proceedings had thereon quashed on motion in arrest of Judgment, by Counsel, for want of the averment of ownership of the money attempted to be stolen. The Prisoner remanded to next Criminal Session for trial.

—

THE QUEEN

versus

HURRYBUN.

—

BEFORE THE FULL BENCH.

—

THE HON. W. G. DICKSON, Procureur and Advocate General,—for the Crown.
E. PELLERAU,—Of Counsel for Prisoner.

Fourth Session of 1866.

On the trial of the Defendant, an unanimous verdict of "Guilty," on the above charge, returned against him by the Jury, was duly recorded,

On the motion of the CROWN, for Judgment,

E. PELLEREAU, of Counsel for the Defendant, moved in arrest of Judgment because of the following alleged defects apparent on the face of the Criminal Information exhibited against the Defendant: —

1ST: In not stating the party to whom the stolen money belonged, or in not stating that the money did not belong to the Defendant.

The fact that the monies did not belong to the Defendant, or was the property of some other person, is a necessary ingredient of the offence of Larceny, which by our Law, is the fraudulent abstraction of anything "*not belonging to Oneself.*" (Art. 301 P. C.) CHAUVEAU ADOLPHE & HELIE. C. PENAL, 5th Vol., page 52-53, (2nd Edition.)

The omission, in the Criminal Information, of the necessary ingredient of the Crime of Larceny vitiates the proceedings had upon such a defective Criminal Information, and the Defendant may avail himself of the omission, by Demurrer, motion in Arrest, as in the present case, or Writ of error. (ARCHBOLD'S, CRIMINAL PRACTICE, pp. 42-43.

Again, our Criminal procedure Ordinance requires (Article 9), that the Criminal Information exhibited by the CROWN or other prosecutor, be direct and certain:

1*st*. As regards the *party* charged.

2*dly*. The *description* of the offence charged.

3*dly*. The *material* circumstances of the offence charged.

One of the material circumstances of Larceny is that the money stolen be not the money of the party charged. This material circumstance should be apparent on the face of the Criminal Information, which, in this case, is perfectly silent as to the ownership of the money.

2dly. Every breaking is not criminal, except in those cases where the Law has made it such. The place broken into, whether it be a dwelling house or building &c., should be stated, so as to allow the Defendant to ascertain how far the breaking charged is a crime in Law.

The fact of the breaking into a dwelling house, being a *material* circumstance, should be apparent on the face of the Criminal Information, as required by the third Section of Art. 9 of our Criminal Procedure Ordinance.

3rdly. The only commencement of execution stated in the Criminal Information, in support of the attempt, is the breaking. However the breaking, of and by itself, being insufficient evidence of a commencement of execution, other facts such as the opening of the "bureau" of the party robbed should have been stated along with the breaking, that the Defendant should be in a position to ascertain how far the additional fact coupled with the breaking into the dwelling house, constitute or not the commencement of execution required by Law. (See the authorities and Judgment collected by GILBERT, § 2 and 5 of his notes, on Article 2 of the CODE PENAL.)

It charges the Defendant, in the very words of Articles 2 and 301 of the PENAL CODE, with having attempted by *breaking* into the *dwelling* of one Chauvin during the *night*, fraudulently to *abstract*, steal, take and carry away therefrom, certain monies.

True it is that it is not stated whose the monies were, 1st. because such a statement is immaterial; Larceny being the fraudulent abstraction of the money or other chattels not belonging to Oneself; it is self-evident that the mere charging a man with Larceny or stealing, necessarily implies that the object abstracted and stolen was not his property. If so, it little matters who is the owner of the thing stolen. How can the knowledge or ignorance of the owner and of his name affect the defence of the party charged, *on the merits*?

Had the Defendant demurred to the Criminal Information, a motion would have been instantly made for leave to amend, and the amendment undoubtedly granted, because of the *immateriality* of the statement required as to the defence of the party charged, on the *merits*. (Article 13 CRIMINAL PROCEDURE ORDINANCE.)

The 2nd defect complained of is without any foundation. The place broken into is stated to be the dwelling of one Chauvin. Is not a dwelling house one of the places the breaking into which is prohibited by Law? Can it be seriously contended that the Defendant was not fully aware of the charge, of its aggravated nature, and that he has been and could possibly be injured in his defence on the merits?

The breaking charged, whether external or internal or both, was the breaking into the dwelling house where the attempt at larceny is charged to have taken place.

The requirements of Art: 9 of the CRIMINAL PROCEDURE ORDINANCE have been satisfied as regards: 1st the party charged; 2ndly the description of the offence charged, (*viz:*) an attempt at Larceny during the night, by breaking into the dwelling house of one Chauvin, at the place mentioned in the Criminal Information; 3rdly the material circumstances of the offence charged, (*viz*:) the attempt made during the *night* and by *breaking* into the *dwelling* or dwelling house of one Chauvin.

3*dly*: The third defect charged against the Criminal Information is, that a mere breaking not being of and by itself sufficient evidence of the commencement of execution required by Law to convict one of an attempt at committing

Larceny, the Criminal Information should have stated such act or acts which, coupled with the breaking, would have rendered the latter criminal in the eyes of the Law.

THE PROCUREUR GENERAL said :

I deny the correctness of the law laid down, on this head, by the learned Counsel on the opposite side. On reference to the notes of GILBERT, on Article 2 of the FRENCH PENAL CODE, Note 12 *bis*, I find it has been decided by the COUR DE CASSATION "que l'escalade et l'effrac-" tion commises dans le but de commettre un " vol constituent un commencement de preuve." Assuming, however, those Decisions not to have met with the approbation of the Court of Cassation, itself, and that of the commentators of the FRENCH PENAL CODE, yet, I read in note 11 of the same annotation : " Cependant si l'escalade " était suivie d'un acte d'exécution quelconque, " *quelque léger* qu'il fut, il est évident qu'il y " aurait tentative. Ainsi l'*ouverture d'un meu-*" *ble* ; " and in the case, the opening of Chauvin's " bureau ; " (CHAUVEAU & HÉLIE. Vol. 2, page 40.) and note 12 : Juge effet que l'intro-" duction dans une maison, avec l'intention d'y " voler, accompagné de l'ouverture des armoires, " constituent un commencement d'exécution."

On the strength of those authorities, I contend, that the several charged defects whether singly or jointly do not and cannot vitiate the Criminal Information exhibited in this case or the proceedings had upon it, and is a necessary inference that the " Verdict " given is good in Law and that the Judgment is not to be arrested as moved.

JUDGMENT.

Were the defects charged against this Criminal Information so many variances between the facts stated in the Criminal Information and the evidence tendered in support thereof, I should have had but little hesitation in coming to the conclusion that this motion in Arrest of Judgment was too late, and would have, at once, proceeded to Judgment. (Articles 13 and 58 of CRIMINAL PROCEDURE ORDINANCE.

But the defects complained of are not so many variances but so many *omissions* of facts which are alleged to be essential and material, and, on that account, should have appeared on the face of the Criminal Information, and the absence of which, therefrom, it was contended, must necessarily vitiate the proceedings had thereon.

There is no doubt that the practice in England, previous to the statutes 14 and 15 VICT. C. 100, (of which our CRIMINAL PROCEDURE ORDINANCE is a reproduction) as well as since the passing of this last statute, has been to state the name of the party robbed, and if unknown, to state the property to be that of some person to the Jurors unknown. The omission of that statement, in England, vitiates the indictment and may be taken advantage of by Demurrer, Arrest of Judgment or Writ of Error. ARCHBOLD'S CRIMINAL PRACTICE, page 42.)

The proceedings on a Criminal Information deficient in the statements required in an Indictment, must share the fate of the proceedings had upon a defective Indictment, unless something be shewn to lead to a different result, either from any difference existing between an Indictment and a Criminal Information, or from a difference between the Criminal Laws of England and of this Colony.

The practice of this Court has been to require the same precision in a Criminal Information, which is required in an Indictment in England, on all the heads stated in Article 9 of the Criminal Procedure Act, that it be direct and certain, 1o. as regards the party charged ; 2o. the description of the offence charged ; 3o. the material circumstances of the offences charged.

Is the non-statement, in this Criminal Information, of the name of the owner, a material or essential circumstance of the offence charged?

This circumstance appears material for this reason that unless it be charged and proved that the stolen monies belonged to Chauvin or to some person not known to the PROCUREUR GENERAL, how is the party charged to come into Court, prepared with evidence to dispose the fact alleged, by establishing, for instance, that the money which he is charged to have stolen is his property, whether from his having received it in payment of a lawful debt or some other equally good legal grounds.

But, was it said, the charge is made in the very words of the PENAL CODE to which have been added words used in England, in describing the offence of Larceny.

The words of the Criminal Information are that the Defendant attempted fraudulently to abstract, (which are the words of Article 301, P. C.) to which have been added " steal, take and carry away," words borrowed from the English Indictment, which, all are sufficiently descriptive of the offence of Larceny and calculated to convey to the mind of any party charged that the money attempted to be stolen was the money of another person.

Were these words sufficiently descriptive of the offence? whence the necessity, in an English Indictment, to state the stolen monies to be the property of such a one, or of a person unknown. Does not this statement show how material to the defence of Defendant, on the merits, is the averment that the monies stolen or attempted to be stolen were the property of some other person and not that of the Defendant? For, unless told so, how should he come with evidence to prove a fact, in the first place, *not charged* ; or 2ndly charged by *implication* merely. If he had received in payment of a lawful debt the monies alleged to be stolen by him and had been in a position to substantiate his allegation, would not such evidence militate in his favor, on the merits?

For anything we know, such proof might have been adduced. If so the Defendant would have been acquitted and discharged.

The essentiality of the averment of ownership

of the monies being thus established, and such averment not being found in the Criminal Information; I come to the conclusion that the Information is bad for want of the averment referred to; 2ndly that the proceedings had upon so defective a Criminal Information filed in this case cannot be upholden.

These proceedings are accordingly quashed; the Judgment moved for must be and is accordingly arrested, and the Defendant remanded to next criminal Sessions, for trial.

This conclusion relieves me from the necessity of going into the merits of the two other alleged defects; however, I may say so much of the second objection, that it is wholly unfounded. The attempt at Larceny is charged to have been in the *dwelling* of Chauvin, which the Defendant had entered by *breaking* his way into it; and of the third objection, that no text of Law has been quoted to shew the necessity of stating the various facts accompanying the breaking whence is to be inferred the commencement of execution required by Law, in support of an attempt to commit a crime.

SUPREME COURT.

ASSURANCES CONTRE L'INCENDIE,—VALEUR DES MARCHANDISES.—PREUVES.

L'évaluation des Marchandises assurées, fixée dans la Police d'Assurance, par l'Assuré et le Mandataire de l'Assureur, établit de prime à bord, la preuve de la valeur de ces Marchandises à l'époque du sinistre; et dans ce dernier cas l'Assuré ne sera pas astreint a prouver cette valeur au moyen de preuves aussi rigoureuses que dans les cas ordinaires; l'on applique alors la règle: "Probationes leviores admittuntur."

FIRE INSURANCE,—VALUE OF GOODS,—EVIDENCE.

The valuation set upon goods insured, by the Insured and the Insurer's Agent, is a priori conclusive of the value of the goods at the date of the Policy; but not of the value of the goods on the day of the fire. The Insured is allowed to prove the value of the goods on the day of the fire by much slighter evidence than is required in ordinary cases. The Rule: "Probationes leviores admittuntur" *applies.*

WIDOW DONZ, - Plaintiff,

Versus

MAURITIUS FIRE INSURANCE COMPANY, Defendants.

Before:

His Honor Mr. JUSTICE BESTEL, and
His Honor Mr. JUSTICE COLIN.

S. J. DOUGLAS, —Of Counsel for Plaintiff.
J. SLADE, —Plaintiff's Attorney.
HON. L. ARNAUD,—Of Counsel for Defendants.
J. PIGNÉGUY, —Defendant's Attorney.

November, 1866.

This was an action brought by Mrs. Widow Emma Donz against the "Mauritius Fire Insurance Company" to recover the sum of $3,500 being the amount of a Policy of Insurance on certain goods and merchandize belonging to the said Plaintiff and insured by the Defendants, for the like amount, on the 28th June 1865.

It appeared that the stock in trade so insured was partially burnt and consumed on the 3rd April 1866, and the loss did not happen, according to the allegations set forth in the Declaration, by means of any of the risks which, in the terms of the policy, would have excluded the Company's liability. The Declaration further averred that the Plaintiff had fulfilled and observed all the conditions which she was bound to perform, and that the Company although requested had refused to pay the amount of the policy.

The Defendants pleaded that they were not indebted in manner and form; that the Plaintiff had no right of Action, and further that the Defendants had always been ready and were ready to pay any sum up to the amount mentioned in the policy, provided the Plaintiff did prove, to the satisfaction of the Company, that at the time of the fire there existed on her premises goods and stock in trade to the amount claimed. That the Plaintiff had failed to make such proof. That such offer was refused. That after the fire, the Defendants did cause the goods and merchandize in question to be appraised, and that the said appraiser found that goods and stock in trade, to the amount of one thousand five hundred and forty-seven dollars and eighty cents, had been damaged by fire. The Defendants paid into Court that sum of £1,547. 80 c. subject to certain attachments lodged in their hands, for various sums, by "Blyth Brothers & Co.," "Louis Deltel and Warnarainsing."

The Plaintiff replied, practically alleging that she had suffered damage to the amount sued for and joined issue.

S. J. DOUGLAS for the Plaintiff, and Hon. L. ARNAUD for the Defendants, respectively called witnesses, and cited, in the course of the argument which is noticed in the Judgment, the following authorities:

DALLOZ. Assur: Terrestres V. P. 204.
POUGET traités: des Assurances. Sauvetage.
DALLZOZ Assur: Terr: Page 224.
S. V. 38—p. 129.

JUDGMENT.

On the 26th June 1865, the Plaintiff insured her stock-in-trade for the sum of $3,500, and

her furniture for $500 more. The Mauritius Fire Insurance Company took the risk and received one year's premium. In April 1866 a fire burst out in the premises contiguous to the house in which the Plaintiff kept her shop and in which she also dwelt. The fire made its way through the wooden partition between the two houses, and according to the Plaintiff's allegations, partly destroyed and partly damaged her stock-in-trade. In this case we have nothing to do with the risk taken on the furniture. The Defendants contend that the Plaintiff has not lost goods and merchandize to the amount originally insured, but to a much smaller amount; they pay into Court the amount of their appraiser and valuation, and take issue upon the difference.

It is to be observed that the pleadings, in no wise, charge fraud upon the Plaintiff; the sole question which directly or indirectly arises from the issues which they raise is this: has the Plaintiff lost $3,500, or more, worth of goods, or, has she not lost so much?

On the 26th June 1865, when the risk was taken, the goods and stock-in-trade were valued at the sum of $3,500, and the Defendants contended that this was not conclusive even as a starting point; the sum of $3,500, amount of the valuation, having no other object than that of determining the amount upon which the premium was to be taken. We are of opinion that that valuation is, *à priori*, conclusive as a starting point, that is to say *à priori* conclusive of the fact that on that day, 26th June 1865, the stock-in-trade insured was of the value of $3,500; of course the next day it was liable to increase or decrease; of course it is not in any way conclusive that on the day of the fire there were goods to that amount; but it shows that on the date of the Policy there were goods to that amount.

In this case, the Appraiser of the Company, before the Policy was signed, went into the shop and satisfied himself that he could report to the Company that the goods might be insured for that sum, and it is difficult to see why the Appraiser's valuation should be conclusive, on that day, to authorize the Company to receive a premium which is an *ad valorem* one, and should not be, on that day, *à priori* evidence to enable the insured to recover the principal sum on which he has paid a percentage in the shape of premium. The conditions of the risk, certainly seem to us to give the same construction to the contract of parties, if the law did not give it.

Article 6 runs thus: —

"L'estimation des objets proposés à l'assurance se fait *d'après leur valeur actuelle*, par le proposant et l'un des Inspecteurs de la Compagnie, sauf décision du "Board of Directors."

The actual value then, is settled between the insurer's Agent, subject to the control of the "Board of Directors."

Article 7 gives to the Company the right to proceed to a new valuation, pending the course of the risk, in case the matters and things insured have apparently increased or decreased; and further, gives such Company the power of causing anterior valuations to be reduced upon verification; again, Article 19 allows the Company, at the expiry of every year, to cause the amount of the risk to be reduced when, *inter alia*, merchandize has been insured.

From all those conditions it would result that whilst the Company has reserved to itself the right of reducing its risk, even pending the course of such risk, it only can do so upon a new valuation to which the insured must submit; but until then, either increased or decreased, the original valuation made jointly by insurer and insured, under the Control of the "Board" is at least very strong *à priori* evidence of the value of the goods insured on the day of the Insurance; and, therefore, although it does not follow that whilst goods insured $1,000, and worth that sum on the day the risk was taken, are worth that sum on the day of the fire, yet that preliminary valuation is of the greatest value as a starting point, because when joined to facts easily ascertained, it may serve as a basis to come to a sound conclusion as to the real value of the goods lost by the fire. This Doctrine is laid down by the COUR ROYALE DE PARIS, *Comp. du Soleil* v. *Bidard*, S. V. 34, 2, 145.

"Considérant que rien n'établit, et qu'il n'est "pas même allégué que depuis cette époque "jusqu'au jour de l'incendie la maison est dimi-"nuée de valeur; que la "Compagnie du So-"LEIL" ne peut prétendre que cette évaluation "faite contradictoirement avec elle, et qu'elle a "trouvée bonne pour la perception de la prime, "doive rester sans effet lorsqu'il s'agit de répa-"rer le dommage; que l'avis des experts sur ce "point n'offrant aucune base certaine d'évalua-"tion ne peut détruire la foi due aux estima-"tions faites d'accord entre les parties."

The Judgment, then proceeding on the bases which we have laid down, goes on to rule that the goods may not have had, at the time of the fire, the same value as they were at the date of the Policy. We find the same principle held by the "COUR DE CASSATION," *Comp. du* PHŒNIX *v Ardesson*. DALLOZ. Assur: terr: V. P. 378, dismissing an appeal from the COUR ROYALE DE PARIS which had refused to appoint appraisers to value certain losses alleged to have been suffered by the Plaintiff. In that case, contrary to the printed conditions of the Policies by which the "PHŒNIX Company" generally reserved to itself the right of not being bound by the valuations born in this Policies, the insured being allowed to prove his loss by every means in his power. It had been agreed that the losses should be settled according to certain annexed inventories; the Plaintiff claimed accordingly, and the Company applied for the appointment of certain appraisers. The Court rejected the Application: "Attendu, after laying down the facts, "que la Compagnie du PHŒNIX ne saurait être "admise à plaider un système dont le résultat "serait que pour augmenter sa prime, elle au-"rait laissé porter des estimations trop fortes, "et que lorsqu'il s'agit de payer le sinistre arri-"vé elle voudrait revenir à des estimations plus "faibles. Que si, en général, il ne faut pas

" fournir aux assurés l'appât d'un bénéfice à " faire ; il ne faut pas non plus donner aux Com- " pagnies le moyen de leurrer leurs assurés ; " que c'est à elle a vérifier avec soin leurs " estimations ; mais que jusqu'à preuve contraire " ces estimations doivent faire foi."

But what proof can the insured bring of his loss, when his books, for instance, have been destroyed ; for, although the agreement in the Policy is very good evidence of the amount at the date of such Policy, it is not and cannot be conclusive of the loss at the time of the fire. *Leviones et quæ passuerit haberi admittuntur probationis* says OMERIGNON. " A l'égard des mar- " chandises en Magasin, si elles ont été assurées " sans désignation, (PARDESSUS 11.291) l'assuré " ne peut être tenu que de prouver qu'il exis- " tait des marchandises, de quelque espèce que " ce soit, du genre de celles qu'énonçait la po- " lice."

After a fire, says POUGET, p : 616, public notoriety may be consulted, and if the insured has neither books, deeds, correspondence or witnesses, his oath may suffice. The result of those authorities which, on this point, are supported by many decisions, amongst others, those already quoted, is clearly this, that the very nature of the damage suffered, shows that the contract of insurance would be practically impossible, if the insured were compelled to prove his actual loss by evidence which would be insisted upon in many other instances. The greater the loss, the greater would be the difficulty against which the insured would have to struggle. It is perfectly impractical to say that the interest of an Insurance Company leads it not to dispute ; it is enough that the company may dispute the claim if it chooses to dispute it ; as contracts of insurance are of very great importance and usefulness it seems just and fair that every kind of reasonable proof should have been allowed the insured to show his loss.

Here, Made. Donz starts with the valuation in the Policy : in June 1865 her goods were taken by the Company to be worth $3,500 and she paid premium on $3,500. It is shown to us by the evidence that apart from the actual contract, that valuation was not exaggerated and we mention this fact merely because it was urged that exaggeration, on the part of the insured, was evidence of fraud, of intent to deceive. Emile Pilot, Jules Bouic, and Alcide César show that there was no exaggeration ; she brought a good many things since the policy was signed, the broker's bought and sold notes show this : she lost goods, not merely such goods as were damaged by smoke or water, but goods burnt and of which the ashes were to be found in her shop, when the Police and firemen effected an entrance.

Mr. Labonté, very clearly show this, and altho' there is evidence the other way, it seems difficult to believe that Mr. Labonté, the chief fireman, who first forced an entrance into the shop, could have been mistaken, whilst others may not have noticed the fact ; and certainly those who entered only after water had been pumped into the room, for sometimes may not have had their attention drawn to the ashes. No one saw goods carried away ; the Police was almost immediately in possession, and kept possession. We have, besides, an inventory made by Mr. Bouic, from information given him by the plaintiff. That inventory which, *per-se*, would be of little value, gives the stock of the shop on the 31st January 1866, and the amount was, then, $3 326.48 : so far as it goes it corroborates the evidence of those witnesses who say that the shop was well stocked.

A good deal was also brought forward about the strangeness of the fire which broke out suddenly in an untenanted house, next door, and the origin of which is most suspicious. There, there have, of late, been many suspicious fires ; Mr. Prince has proved, that this was one of them, is possible, but what connexion has there been proved between that fire and the Plaintiff save that the Plaintiff's goods have been destroyed.

The pleadings set forth no such suspicion, and if fraud should be distinctly charged in any case, it is in a case of this description where the interest of the public, no less than the private interest of the Company requires that the fraud should be thoroughly sifted ; here the Plaintiff has not been called upon to meet charges of fraud or insinuations of suspicion. We were told, from the Bar, that the house itself was insured by the Company and that the risk was paid, a circumstance which unexplained does not support the notion that this fire was incendiary.

We are fully aware of the great risk to which may be exposed a Company of this description. Insurances on merchandize and property which is easily carried away, offer greater dangers than all, but in these as in most cases, good faith is presumed.

Besides their rights to inspect and proceed to new valuations, Insurance Company have a piece of very good advice given them by the writer often quoted on their side, Mr. POUGET : " de " pareilles assurances ne doivent être faites qu'a- " vec des personnes d'une probité connue." It is right to add that we have before us no evidence to make us doubt the Plaintiff's honesty.

On the whole we have come to the conclusion that the Plaintiff has made out her case. It is very true that since the 31st January 1866, she must have sold some of her goods ; but we are told that the linen drapery trade has been very slack indeed, of late, still, on her own statement ; that conveyed to us by Bouic's inventory, her stock was $3,326.48, on 31st January 1866 ; the fire took place on the 3rd April ; two months' sales have to be deducted from that principal sum ; by valuing the sales of every month at the sum of $250, we think we take a liberal view of the case ; that would reduce the stock, at the time of the fire, to the sum of $2,826.48. Necessarily our valuation can only be approximative ; if her sales were equally slack every day, the Plaintiff would have sold less than that amount ; if they were as good after as before the 31st January, she must have sold more. Judging from the Policy, the inven-

tory, the evidence of Pilot, and that of Bouic, we think that sum a fair criterion.

Judgment shall be entered for the Plaintiff, for that sum, to wit: $2,826.48 with interest from the date of the Declaration, and Costs.

The Judgment to be executed, subject to the attachments lodged in the hands of the Company, all rights reserved, as to them.

BAIL COURT.

—

CAPITAINE ET ARMATEUR,—MARCHANDISES VENDUES ET DÉLIVRÉES,—ACCEPTATION A PAYER,—RESPONSABILITÉ PERSONNELLE DU CAPITAINE.

L'acceptation d'un compte par un Capitaine de la marine Britannique, pour marchandises à lui vendues et livrées, sans la mention expresse qu'il entend engager les Agents et Armateurs du navire, le lie personnellement.

—

MASTER AND OWNERS OF A SHIP,—GOODS SOLD AND DELIVERED,—APPROVAL OF ACCOUNT,—PERSONAL LIABILITY OF THE MASTER.

The Master of a British ship must take care to confine, by express terms, the credit made him, to his Owners only, else he will be personally bound.

—

HARPER & Co.—Plaintiffs,

Versus

CAPTAIN LEMON,—Defendant.

—

Before:

His Honor Mr. JUSTICE COLIN.

—

P. L. CHASTELLIER,—Of Counsel for Plaintiffs.
G. RITTER, —Plaintiffs' Attorney.
E. DIDIER, —Of Counsel for Defendant.
J. HALAIS, —Defendant's Attorney.

—

5th December 1866.

This was an Action brought to recover, against the Defendant, Master of the ship "*John Stuart*," the sum of fifty seven pounds, eight shillings and nine pence sterling, for goods sold and delivered to him as Captain of the said ship, from 21st July to the 15th November 1866.

The account presented to the Defendant was made out: "Debtor" the Captain and Owners of the ship "*John Stuart*," and was approved of by the Defendant, in these terms: "correct. W. Lemon."

The Defendant contested the Plaintiffs' claim and urged that his Owners, and not himself, were liable for the goods sold and delivered to him by the Plaintiffs. The Plaintiffs put in the account and maintained that, according to Law and to the facts of the case, the Defendant was liable.

There is no doubt, as it was maintained before the Court, that the right of the Master of a British ship to bind his Owners, in a foreign port, for goods bought by him for the use of the ship, may give rise to many important considerations. If it be true that the Master is the Owner's Agent, there is no doubt that he cannot bind the Owners beyond the scope and extent of his agency and that the Courts of Law will, in cases of this and similar descriptions of agency, as well as in other cases of Principal and Agent, keep the Agent within the strict limits of the powers entrusted to him. According to the circumstances of every case, will the evidence, which goes to show the necessity upon which the Owner's liability must rest, require to be more or less strong.

But, in reality, no such difficulty can arise here; for, this is a British ship, and the rule is that unless the Master takes care, by express terms, to confine the credit to his Owners only, he will be personally bound by a contract of this kind made by himself. ABBOTT, *on Shipping*, quoting *Rich* v *Coe. Cowper*, 636.

No doubt the Merchant who sells the goods may, sometimes, have both the Master and the Owners liable to him, and no doubt also, the Master may, in certain cases, have a right to call upon the Owners to repay him; but such is not the case here; the Master contracted directly; he did not, in distinct terms, confine the credit to his owners only; the evidence is the other way, and he must be held liable to these Plaintiffs.

It was attempted to show that the *onus probandi* would, according to "French Maritime Law," lie upon vendor, to shew that he has given credit to the Master, alone. That is not invariably the case; the Master is liable, directly, if his obligation is the result of the contract he makes or documents he signs; and, in this case, he never repudiated the account charging him personally; far from it. Besides, a reference to the books will show several cases where the Master was to be held liable, and the Owners not; but there is no occasion to enter at any length into the consideration of this point; this ship is a British ship, and the Master a British Master; the Owners, British Owners. (3 and 4 Wm. 4. C. 55 Sect. 5 and 17 & 18 Vict. C. 104. Sect. 8).

Judgment must go for the Plaintiffs, with Costs. Arrest in execution for three years.

SUPREME COURT.

—

DIVORCE,—"SÉVICES."

Les époux peuvent demander le divorce, pour sévices graves, desquels il résulte que la vie commune leur est devenue insupportable, mais généralement parlant, le divorce ne sera point accordé pour un cas isolé de mauvais traitement.

—

DIVORCE,—"SŒVITIÆ."

An action for a divorce may be grounded on sœvitiæ of habitual occurrence, and of such a serious nature, as to prove that the conjugal life is intolerable; but one single instance of ill-treatment will not be a sufficient ground.

—

CAZABAN THE WIFE,—Plaintiff,

versus

CAZABAN THE HUSBAND,—Defendant.

—

Before:

His Honor Mr. JUSTICE COLIN and
His Honor Mr. JUSTICE ARNAUD.

—

E. PELLEREAU, —of Counsel for Plaintiff,
F. GILOT, —Plaintiff's Attorney,
Hon. V. NAZ, — Of Counsel for Defendant.
F. MALLET, —Defendant's Attorney.

—

5th December 1866.

The Plaintiff, in this case, sued her husband for a divorce *à vinculo Matrimonii*. We have heard several witnesses in support of the facts alleged, and several called by the Defendant. The "Ministère Public" gave conclusions against the application, when the Court took time to consider.

There has been in this case, a good deal of very contradictory evidence; in reality, a good deal of false swearing one way or the other. We are inclined to believe rather the witnesses for the Defendant. It seems hardly credible that if this woman had been often beaten by her husband, under her own mother's roof, that such facts should be unknown to the mother, and she certainly ignores them. There is, then, before us, no credible evidence to the effect that she was struck at all, except on one occasion; and it has been held by this Court, in *Bellard* v. *Bellard*,* that the fact of a husband striking his wife once, in a fit of anger, is not sufficient to authorize the Court to dissolve the bonds of holy matrimony that unite together a young couple but lately married.

The wife complains that her husband conveys away his property to the prejudice of her child; there is no proof of that; what property there is all is his own: there is no proof that he squanders it She complains that he does not allow her to go out as she likes; that he refused her leave to sleep in a pavillon which she preferred to her usual bed-room, which appears to be too near the shop. These are certainly singular grounds for an application for a divorce; it no wise appears that he acted in the way he has been represented, from feelings of cruelty or spite. The pavillon he lets, the bed-room which is good for him, is not shown to us to have been bad for her. We do not perceive how his refusal to let her take a drive into the country without him, is to be construed as an outrage. She complains that the shop he keeps is visited by women of ill-fame and persons of very low description. That is denied by witnesses just as trustworthy, we think more so, than the witnesses who assert the fact. But *esto* that it be true, a grog shop-keeper can hardly be expected to drive away his customers because their morality or manners are not as they should be. A shop where Colonial Rum and such other drinks are retailed is not invariably the resort of the best description of people The Plaintiff married her husband, for better, for worse, and surely cannot, now, turn his trade and his attendance on his business into a cause for divorce. The undue familiarities with women in the shop, are not, in our opinion, made out. The fact that the Defendant got his wife to wait on the customers may or may not be true; but it is in evidence that when he was in the shop, with his servant, he did not ask her to attend to the customers.

The "Ministère Public" has suggested that this young couple had better have been left alone; we think so too. The indiscreet interference of relatives, however well meant, (and they may have been well meant.) will not tend to soothe the petty annoyances, the slight outbursts of temper, which, left to themselves, will soon cool down, and notwithstanding which these parties, better taught by experience and their own self-restraint, may enjoy, if not the full sunshine of conjugal bliss, at all events, a fair and reasonable share of happiness.

We must, therefore, reject this application and give Judgment in favor of the Defendant.

* *Supra*, Page 63.

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SUPREME COURT.

—

DIVORCE,—PROCÉDURE, - MANDAT,—PREUVE TESTIMONIALE.

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Lorsque l'époux contre lequel la demande en divorce sera dirigée, se sera absenté du Pays, en laissant un mandataire, le demandeur pourra prouver par témoin l'existence et la nature du mandat, et signifier les actes de la procédure à ce mandataire.

DIVORCE,—PROCEDURE,—POWER OF ATTORNEY, PRINCIPAL AND AGENT,—ORAL PROOF.

Where one of the Spouses against whom the action in divorce was entered, had left the Colony, and appointed an Agent, the Court allowed the Plaintiff to prove the Agency by witnesses and to serve the proceedings on such Agent.

—

BRUNIQUEL THE WIFE,—Plaintiff,

versus

BRUNIQUEL THE HUSBAND,—Defendant.

—

Before:

His Honor Mr. JUSTICE N. G. BESTEL and
His Honor Mr. JUITICE COLIN.

—

J. COLIN, —Of Counsel for Plaintiff,
J. BOUCHET,—Plaintiff's Attorney,

Defendant not appearing.

—

5th December, 1866.

In this case, the Plaintiff has applied to this Court, for a divorce. The Defendant who is out of the colony, but left behind him an Agent alleged to be empowered to represent him for the purposes of this suit, has left default; the legal notices and summonses were duly served on the alleged Agent, and the sole question for the Court to decide is, whether service upon this Agent has been good service in this case.

J. COLIN, for the Plaintiff, urged that it was; for, the law does not prohibit, in certain cases, proof of agency by witnesses, and in this case he had shown by witnesses that there had been a power of Attorney; he had proved that it had been lost, and therefore might and did prove, by parole evidence, the contents of such power.

The question, in reality, before us, is not whether a Defendant may appear or be represented by an Agent, in a suit for divorce. Art 243. of the CODE allows the Defendant to appear in person or by a "fondé de pouvoir," and Art. 241 directs the Plaintiff to summon the Defendant in the ordinary way. We think, therefore, that if we could be satisfied that this alleged Agent was in reality the Defendant's Agent, and that his power covered the right or duty to act, in the matter of a divorce, for the Defendant, service upon the Agent would be, for all matters connected with the sittings of the Court, good. But no power is produced; it is alleged that the power of Attorney has been mislaid or lost and the Plaintiff was allowed, saving the decision of the Court, on the point which was reserved, to show the loss and the contents of the document. The question, therefore, is this: Can this be done by parol evidence?

We think that when a document has been lost and the fact of its loss has been established to the satisfaction of the Court, its contents may be proved by parol evidence.

Of course the proof which the Court will require may vary with every case; if the document has been registered, it is right to take out a registration copy; for, if the identification of the registration copy with the last document, be satisfactorily made out, the contents will be described, at once, without trusting further to the slippery memory of a witness. But, in this case, the power of attorney was not registered, parties are therefore thrown back upon the memory of those who have examined or read the document so as to reconstruct it.

In so serious a matter as a divorce, we should require strong evidence to induce us to consider the alleged Agent as sufficiently authorized to receive service of legal documents.

But we are satisfied from the evidence adduced that there was a power of Attorney given by the Defendant and that such power, now lost, authorized Mr. Duperrel to act for the Defendant in this matter of a divorce.

We shall sustain the service of the notices, and as on the merits of the case, the Plaintiff's grievances have been made out, we shall, in conformity to the conclusions of the "Ministère Public," give a decree for a divorce and authorize the Plaintiff to appear after the delays and notices required by Law, before the Officer of the Civil Status of Port Louis, who is, by the Judgment, authorized to pronounce the divorce *à vinculo matrimonii* between the Plaintiff and her husband.

Costs against the Defendant.

SUPREME COURT.

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BREVÊT D'INVENTION, — EXPERTISE, — SAISIE PROVISOIRE,—ORD. No. 11 DE 1835.

Recours en justice du Bréveté contre tout acte fait en contravention des termes du Brevet.

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LETTERS PATENT,—SURVEY,—SKILLED WITNESS "EXPERT,"—PROVISIONAL SEIZURE,—INJUNCTION,—ORD. No. 11 OF 1835.

Remedy of a Patentee, in a case of contravention to the letters patent, by action at law, by injunction or by provisional seizure.

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EX-PARTE: PAUL COUGET.

—

Before:

His Honor the Acting CHIEF JUDGE and
The Honorable Mr. JUSTICE COLIN.

—

E. DUPONT,—Of Counsel for the Applicant.
L. RODESSE,—Attorney for the same.

5th December 1866.

This was a motion made by E. DUPONT, for Paul Couget, of Port-Louis, tobacconist, for an Order from this Court, authorizing a skilled Engineer to repair to the premises occupied by Félix Goze & Co. of Church street, Port-Louis, tobacconists, to examine a certain machine for cutting tobacco, and to report whether the said machine be similar to the one for which the said Paul Couget has obtained the exclusive patent of introduction for the exclusive use thereof, from the Government of this Colony, on the 29th May 1865.

This motion was made upon the Applicant's affidavit disclosing the fact that he had obtained a patent and stating that Félix Goze & Co. had introduced a machine similar to his own for the purpose of cutting tobacco without patent or authorization, and had infringed the privilege vested in him, the said Paul Couget.

The Statutes or Ordinances which are passed by the Legislative, for the protection of inventions and the punishment of those who infringe patents granted by the executive power, usually enact penalties or forms of actions sufficient to meet the injuries that may arise.

By Ordinance No. 11 of 1835, article 3 par: 2, patentees are authorized to prosecute, before the Court, all transgressors against their exclusive rights; recover damages and have suppressed and confiscated, to their profit, all machines, utensils, and so forth, used according to the invention or process for which such patentees have obtained the patents: The provisional seizure of such utensils and goods manufactured according to the privileged process, may also be ordered.

It is clear, however, that the Judge in Chambers will not allow this last summary measure to be adopted unless *à priori* satisfied that there has been an infringement or a piracy; and as this, according to the nature of the invention or other patented right, may be more or less easily proved, care must be taken that whilst endeavouring to protect a patentee who complains of an infringement of his exclusive right, third parties who may turn out after all to be innocent of a piracy, should not, by a provisional seizure of their machinery or implements of industry be made liable to suffer incalculable damage at the hands of, perhaps, an insolvent patentee.

In FRANCE where provisional seizures may be granted also, it has been held that "la loi autorisant la description avec ou sans saisie, la saisie ne doit être ordonnée que lorsqu'il y aura lieu de craindre la disparition des objets incriminés." *Parisot* v. *Pauwels*—8 May 1845.

An application had been made, in this case, to the Judges in Chambers, and one of us, Mr. JUSTICE COLIN, declined to grant the provisional seizure prayed for, upon a meagre affidavit then laid before him, unless the Applicant submitted himself to deposit, at the Registry, a reasonable sum, both to show his good faith and also to secure some indemnity for the innocent Defendant, should the Applicant fail to establish, in the action he was by Law bound to enter, his exclusive right or the alleged wrongdoer's infringement of such exclusive right.

The patentee not being prepared to make such deposit, has now moved the Court for an Order appointing an Engineer to examine and verify the nature of the machinery used by Goze & Co.

The usual way is to proceed by action at law, as by our Ordinance directed, and upon the right being established in such action at law, to obtain an Injunction to restrain the Defendant from further infringement; besides, execution for the damages that may have been recovered, and the suppression and confiscation which may then have been ordered.

Sometimes, the Court of Equity will, even before directing an Action at law, grant such an Injunction, when they are satisfied that the case requires summary interference. This was done in *Abernethy's* case, 3. Law J. 209. But this is seldom done when the patent is recent, or where the piracy or imitation has been doubtful. (*Harmier* v *Plane*, 14. VESEY. 130. *Hill* v *Thompson*.3, MERIO. 622)

In this case the patent is quite recent, it is signed 29th May 1866 and was read in Court on the 7th August 1866. Nor, has, in fact, any motion been made for an Injunction. According to the usual practice, therefore, an Action at law, such one as the Ordinance directly authorizes, is the remedy which the Applicant has in his own hands, if his right has been infringed. We have, as at present advised, before us, neither the specification of the patented machine nor the description of the machine, the use of which is stated to be an infringement of the patented one; we have no action before us; we have, saving the bare statement of the patentee himself a most meagre one; no *data* upon which we can safely interfere by means of a seizure.

It is right to interfere by sending an Engineer to examine and describe the machine in question. By the present law of *France*, that of the 25th May 1838, art 47, this, not only might, but should be done, but that law is not law in Mauritius, and its provisions have not been adopted in our Ordinance No. 11 of 1835.

Although, however, we cannot act under the protection of a special enactment, there is no doubt that the Court has often given orders of this description, and there is no reason why, in a case like this, where we do not think we can safely order a provisional seizure, except under conditions, we should not resort to a conservatory measure which, whilst it will enable the patentee to protect his right, if such has been infringed, will not expose the alleged wrongdoers to prejudice and loss if they are innocent. The law allows that which it does not prohibit, and we think the application should be granted.

We order the affidavit to be filed, and appoint

Mr. Bousquet, Engineer, to examine the machine in question for cutting tobacco, used by Felix Goze & Co. of Church street, tobacconists and describe the same in all its particulars. We order that, if necessary, he shall be accompanied by Usher Pitchen.

BAIL COURT.

MANDAT ET MANDATAIRE,—ACTION EN DOMMAGES-INTÉTÊTS,—ERREUR DANS UN ENVOI DE BIJOUX,—APPEL DE JUGEMENT DE MAGISTRAT DE DISTRICT.

Lorsqu'il s'agira de fixer des dommages à l'occasion d'un fait préjudiciable qui ne sera point un acte ayant occasionné à la personne du plaignant un tort physique ou moral, le dommage souffert devra être prouvé spécialement et ne devra pas être fixé d'une manière arbitraire.

PRINCIPAL AND AGENT,—ACTION IN DAMAGES,—MISTAKE IN AN INVOICE OF GOLD JEWELRY,—APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE.

In these cases not including injuries to the person and in which physical or moral grievances have not arisen, special damages must be clearly proved to have been sustained and cannot be arbitrarily fixed.

C. PECK & DELAUNAY,—Appellants.

versus

JAME,—Respondent.

Before:

His Honor Mr. JUSTICE COLIN.

W. NEWTON, —Of Counsel for Appellants.
J. HALAIS, —Appellants' Attorney.
P. L. CHASTELLIER,—Of Counsel for Respondent
G. RITTER, —Respondent's Attorney.

14*th December* 1866.

In this case, which was an Appeal against a Decision of the District Magistrate of Port Louis, on an action of Damages, Judgment had gone, before the District Court, for the Plaintiff, when the Defendant, very soon after, applied for and obtained leave to bring on the case *de novo*, because certain extracts of letters produced by the Plaintiffs before the Magistrate were not true and correct extracts.

The Plaintiff, by his Counsel, at once consented and offered to produce the letter-book itself, which was done, and the Magistrate allowed the parties to be heard again, when the Counsel for the Defendant read certain passages from letters written by Plaintiff to Defendants, in France.

The object of the Defendants was, evidently, to show that the Plaintiff had ratified and sanctioned the Defendants' doings and agency in Paris, and was stopped from suing them for an alleged breach of duty.

The Magistrate below, on the 31st of October last, came to the conclusion that there had been no ratification or waiver of right, and gave Judgment for the Plaintiff, allowing the full damages claimed. From the letters that passed between the parties, I am of opinion that the Magistrate was right when he decided that the Plaintiff had not waived his right to recover damages from the Defendants; but I do not think that the damages allowed to the Plaintiffs, by the Judgment appealed against, have been made out to the amount, at least, for which a decree was given. The Plaintiff may well have laid his damages at the sum of $200, but in a case like this, special damages must be proved and not arbitrarily fixed.

There are cases in which damages may be assessed in a more general way, when, for instance, injuries to the person have been inflicted, from which physical or moral grievances have arisen, which must be met by damages.

But this is not such a case. Here, it is perfectly plain that the Plaintiff, who ordered out gold jewelry weighing 14 gold carats, and gave his order to the Defendants who employed a man whose business seems to be to make jewelry inferior to the standard weight, received gold chains weighing not 14 carats as he ordered them, but 5 or 6. The fraud was discovered not by the Plaintiff who sold a first invoice of similar jewelry, but by a Mr. Pontié; so that if the Plaintiff, a Jeweller by trade, can have been mistaken by the appearance of the gold chains, so may the agents in Paris, who do not appear to be Jewellers by trade and against whom personal good faith here is no evidence.

The Plaintiff sent back the gold chains he received, but get others in exchange, apparently of the proper weight; he had decided upon surer to keep them, and therefore although he may not have waived his right to obtain damages from his direct agents for any wrong he may have suffered, he cannot surely recover more than the damage really suffered.

Now it appears from the Plaintiff's own statement that the chains received and sent back would have been worth £515.72 c., if made according to Plaintiff's order; on that sum he paid 6 o/o duty, which *ad valorem* duty he seems to have paid a second time when the other chains were sent to him; he is clearly to be reimbursed the duty he should have paid once, but through his Agents negligence was obliged to pay a second time. That will be $30.94 c.

To send the inferior chains back, he paid £1.6.8 freight to the Peninsular and Oriental Company; he is entitled to have credit for freight

and freight paid a second time, on the chains sent in exchange. That will be twice £1.6.8 or $13.33.

Again, the Plaintiff swears that he might have made a profit on those chains, but he does not say that when he got the other chains sent him it was too late to realize his profits; nor does he show the amount of his loss of profit; if he really suffered any; in fact, no evidence at all of any positive loss caused by the delay that occurred between the first invoice and the second. It is not shown that the Plaintiff remitted money in payment of the chains returned. The Magistrate seems to have allowed the full damages claimed, because he thinks that if the chains had arrived in a proper state, in the first instance, they could have given the enormous profit generally realized in this Colony: namely, 100 per cent. That may be, but it is not shown, by the slightest evidence, that when the chains did arrive, I shall not say "made according to the proper standard" but according to the order sent by the Plaintiff, the market value of jewelry, in general, or of gold chains, in particular, had fallen, so that, except for the delay suffered, there is no actual loss proved, and what loss such delay may have caused is not proved either.

Altho' it is right that Agents, when legally answerable, should be compelled to make good the loss suffered through their agency, care must be taken that the damages allowed should not be vindictive damages.

Now the Defendants' personal honesty and good faith are not denied; the Plaintiff becomes irritated and complains of them personnally, when he finds that those Agents exonerate the manufacturer Marmin from the charge of robbery; now the Agents' appreciation of Marmin's conduct, and they give their reasons for such appreciation, may perfectly be erroneous, but this does not add to their liability; this does not increase the Plaintiff's real loss; it does not change the personal good faith of men whom, it is to be noted, the Plaintiff, at first, never attempted to make answerable for the manufacturer's fraud; and against him he turns, only when they propose a mode of settlement with Marmin which it did not suit the Plaintiff to accept.

It may be that the delay which elapsed between the invoice of the chains returned and the invoice of the chains sent in exchange may, according to the accounts between parties, have caused some loss of interest, which would have to be added to the damages already mentioned; but there is no evidence to show the state of such accounts.

This case was very carefully argued on both sides, but no other specific damage was proved.

On the whole, therefore, I am of opinion that the Judgment appealed against be affirmed on its merits, with the modification, however, that the damages be reduced to the sum of $44.27.

Each party to pay his own costs.

SUPREME COURT.

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ABSENCE,—ENVOI EN POSSESSION,—ADMINISTRATION DE LA COMMUNAUTÉ,—AUTORISATION DE VENDRE.

—

ABSENCE,—"COMMUNAUTÉ,"—POSSESSION AND ADMINISTRATION THEREOF,—AUTHORITY TO SELL.

—

EXPARTE:

AMEER THE WIFE.

—

Before:
His Honor THE ACTING CHIEF JUDGE
and
His Honor MR. JUSTICE ARNAUD.

—

W. NEWTON,—Of Counsel for Applicant.
H. BERTIN, —Attorney for the same.

—

21st December 1866.

In this matter the Court was moved for an Order authorizing the Registrar of this Court to issue a Rule authorizing the said Ameer the wife, acting as manager of the community of goods and properties which existed between her and her husband (out of this Island,) to sell to Abdoul Ackbar and Mansourally Banon, for a sum of $895 nett and cash, the share and portion belonging to the said community of goods and properties in a certain fishery established at St. Brandon Island, in the firm "Ameer & Co., and in the lease of this said St. Brandon Island, by the Colonial Government, to the said firm "Ameer & Co."

This application is the result of a previous Rule of Court, of the 28th September last, ordering the Applicant to take charge and manage, during the absence (from this Island,) the property belonging to the community between herself and her husband.

Amongst other properties the community owns a third share in the fishery above mentioned, and also a third share of the Firm "Ameer & Co.," in the lease of the island aforesaid.

It would appear that these shares, far from being profitable, have left a large deficiency of $922.02, and that the interest of the community between Ameer and wife requires that Ameer the wife do avail herself of the offer made of purchasing the share of the community, for the sum of $895, nett and cash.

We concur in the expediency of securing this advantage to the community Ameer.

But at the same time we are anxious that the community should have the full advantage of that sum.

To this end, we order, that the said sum when received by Ameer the wife, be by her paid into the Savings' Bank, until a more lucrative and equally safe investment can be found for the same, the interest of that sum to be paid to the said Ameer the wife and to be laid out in the maintenance of herself and family.

On this condition, we order, that the Rule prayed for do issue.

SUPREME COURT.

CONCESSION,—CONDITIONS RÉSOLUTOIRES,—RÉUNION AU DOMAINE,—POSSESSION,—PRESCRIPTION DE DIX ET DE TRENTE ANS.

Circonstances d'après lesquelles la Cour Suprême a décidé que les conditions d'un Acte de Concession avaient été remplies et que le Département de la Guerre, quoiqu'ayant pris possession du terrain concédé n'en avait point acquis la propriété par voie de prescription.

DEED OF GRANT OR "CONCESSION,"—RESOLUTIVE CONDITIONS,—REUNION TO THE DOMAIN,—LIMITATION OF TEN AND THIRTY YEARS.

Circumstances under which the Supreme Court has ruled that the conditions under which a deed of grant had been made were fulfilled and that the War Department, although in possession of the plot of ground granted, had not acquired the same by way of limitation or "prescription."

MURRAY,—Plaintiff.

versus

THE WAR DEPARTMENT,—Defendant.

Before:

His Honor the Acting CHIEF JUDGE and His Honor Mr. JUSTICE ARNAUD.

E. DUPONT, —Of Counsel for Plaintiff.
E. DUCRAY, —Plaintiff's Attorney.
S. J. DOUGLAS,—Of Counsel for Defendant.
J. BOUCHET, —Defendant's Attorney.

21*st December* 1866.

In this case the Paintiff claims possession of a piece of ground situate near the harbour of Port Louis, as having purchased the same from the heirs Dayot.

The Defendant pleads seven pleas which, practically, raise the following issues:

1*st*.—The Plaintiff has no capacity to sue, in as much as his title is invalid, because the heirs Dayot were not the lawful owners of the said ground, it having been reunited to the domain "de plein droit," by reason of the non-execution of the conditions imposed in the grant; and further, that supposing the heirs Dayot not to have forfeited their right to the ground, they had no power to sell it, and such sale was null, unless they proved that the ground had been put in value within one year from the date of grant, such being a condition of the said grant.

2*ndly*.—That the Civil Government of the Colony had prescribed the ownership of the ground in question, by having been in possession of it for upwards of thirty years.

3*rdly*.—That the War Department was owner of the ground by a grant from the Civil Government, dated 1841, coupled with possession for upwards of ten years and consistently with Art. 2,265 of the CIVIL CODE.

At the hearing of the cause several witnesses have been heard and documents put in, from which evidence we find the following facts to have been proved:

The piece of ground claimed, originally of 4 acres 61 perches in extent, was granted by regular deed of concession to Thomas Dayot, on the 30th September 1769.

It became reduced by 1780 square toises, such portion having been taken from it in 1803 (6 Vendémiaire an 11), by the Government of those days, in exchange for other land given to Dayot, in compensation.

At the time of the concession of this ground, Dayot had built upon it several huts and a salt pan which seem to have been abandoned at the beginning of the present century, and Dayot appears to have used the ground for the last time at distant intervals, from 1807 to 1812, by removing some clay from it and carting it to another salt pan which he possessed in the neighbourhood.

About the year 1808, the military authorities caused the ground to be occupied by soldiers, who raised a mound of earth and forming it into a Battery which, however, was soon afterwards abandoned and allowed to fall into decay.

From 1812, that is from the time that Dayot carted clay from the spot, not a single act is proved to have been done by any one, which could be construed into an act of possession, and this state of things continued until the 11th September 1816 when, after the death of Dayot, his heirs wrote to the Civil Government of the Colony, offering to give up the ground in question on condition of being indemnified.

To this letter there is no answer,—but to an application which appears to be of a similar nature, the Civil Government entertains the application ; the Colonel of Engineers is consulted and in his report, dated 8th July 1816, appears for the first time the idea that the Civil Government might possibly have a right to the ground in question. He says : " the same mode I should conceive, for the Government to obtain possession again of the ground (if it has not a right to keep it) might be resorted to, that is by an exchange of property."

The Civil Government, however, does not entertain the possibility of keeping the land in question, a letter of the Government Chief Secretary of the 19th of August, addressed to the Government Surveyor, requires him to prepare the necessary estimates for exchanging lands offered by the heirs Dayot, among which is the ground in question, against the other Government property. The plan suggested is not, however, carried into execution. We find a letter of the 24th June 1817 which mentions the subject and alludes to the land mentioned in the Petition of the heirs of Dayot, as a portion of land belonging to the deceased ; and lastly a letter of the Deputy Secretary of the Acting Governor, Major General Hall, to the effect that the Government considers the land in question to have become their property, along with the battery from which it is considered inseparable.

From this time no step is taken, no act done by any one, from which possession can be inferred, until the year 1840, or thereabouts, when a troop of sappers took possession of the mound, formed it again into a battery, by means of sand bags and masonery, and mounted three guns; the men stopped one day and the guns remained a few weeks on the spot; and again the battery was allowed to fall into decay, until the ground was purchased in 1863 by the Plaintiff who, after having worked some time on the ground, was turned out of possession by the Defendant.

From those facts, the Court has to come to their Decision on the several issues raised.

We are of opinion, on the question raised by the first five pleas, that the Plaintiff has made out a sufficient title to sustain this action; he has duly purchased the piece of ground in question by notarial instrument and for consideration.

It is contended, for the Defendant, that the ground has been reunited to the domain, on the strength of a clause, in the deed of concession, which says that in default of compliance with the regulations concerning the concessions of the Island : " Les dits terrains demeureront de plein droit réunis au domaine du Roi." It is clear from the evidence, that such reunion had not been held to have taken place within the first 30 years following the concession ; for we find, in 1803, that Government purchased, by way of an exchange, a portion of that very ground, admitting thereby the validity of the concession ; nor can we hold that such reunion has taken place subsequently, consistently with the Proclamation of 25th January 1816; a Decision of the Land Court would have been necessary to prove such result, and there is nothing of the kind before the Court.

We consider, not only that this land has not been forfeited, but that the heirs Dayot had a right to sell such rights as they may have had under the deed of concession. They were to have been foreclosed from such rights in case of non-execution of the conditions made to their father, that he should put the land in value within the year. Now the deed, which contains the concession of two pieces of ground adjoining each other, describes the ground in question as having been built upon, previous to the grant, by Dayot, who had already erected salt-pans on the spot, so that, should we be of opinion that this clause applies to the ground under consideration, as well as to the other, we are satisfied that the condition required for selling, has been fully complied with.

Admitting that the heirs Dayot have not forfeited their rights by not executing the conditions of the grant, have they lost their right of ownership by allowing prescription to run against them for upwards of 30 years ? In other words, has Government prescribed the ownership of the land by 30 years possession ?

It has been argued that Government, as grantor, could not resume by prescription that which they have granted. We deem it unnecessary to decide that question, in as much as we are of opinion that the Defendant has failed to prove a title by the prescription of 30 years.

There is a wide difference, in the law, in the manner of acquiring and the manner of retaining possession. The rule is : *Licet possessio nudo animo acquiri non possit tamen solo animo retineri potest.* Applying this principle to the facts of the case, we find that Dayot the father has title and possession from the time of the concession, down to the time of the exchange of land, in 1803. From that time to 1817 his possession is interfered with, for the first time, by the military force raising a battery on the spot, in 1807 or 1808 ; but has this interference the legal character necessary to establish a prescription ? We think not.

The possession, by the military, then took place for a short time and for the defence of the Island; this fact excludes the idea that it was taken *animo domini* ; whilst it agrees with the temporary character of the occupation to suggest that nothing was meantbeyond using the ground, upon an emergency. This conclusion is supported by what takes place in 1817 ; at that time the heirs Dayot propose to give up the ground for consideration, and in the correspondence exchanged on the subject appears, for the first time, in a dubitative form, the idea that the Government might have a right to it ; and the Government Officer who puts forth this idea, the Colonel of Engineers, that is the occupier of the land adjoining, used the words " in order to obtain possession, " again clearly implying that he did not believe himself, then, to be in possession.

Now, a possession undoubted by the party in

whose rights it is claimed to day, is no possession, and surely no possession sufficient to base a prescription upon, which must be public, peaceful, *animo domini*, continuous, uninterrupted and inequivocal. The correspondence before the Court proves the absence of most of these essentiel conditions, and, therefore, lead us to the conclusion that, up to the time of such correspondence, no prescription has run against the heirs Dayot.

The next step brings us to the letter of the acting Governor, Mayor General Hall, who claims the land as Government property. This letter has been objected to by the Plaintiff, on the plea that there was no evidence of its having been received ; but we believe it to be admissible ; it bears the same character as the larger part of the correspondence before the Court, and put in by the Plaintiff himself, (such are the letters marked 9, 10, 12 of Plaintiff's evidence) it comes from the same source, forms part of the minutes kept in due course of business, in the local Government Offices and at a time too remote to admit of verification.

But what does the letter prove ? Nothing more than that Government, at that time, considered that they had acquired the ownership of the ground and meant to retain it. From the reasons we have mentioned it appears to us that the Government was in error. Clearly the determination contained in that letter, to retain the land without indemnity, could not create for Government, a right of ownership. Article 545 of the CIVIL CODE, rules the question :

" Nul ne peut être contraint de céder sa pro-
" priété si ce n'est pour cause d'utilité publique
" moyennant une juste et préalable indemnité. "

It is no starting point for a prescription, which can only start from a physical, public, inequivocal act of possession ; and the evidence shows nothing like an act of possession by Government, at that time, and for the twenty two years following. By law, therefore, the owners by title and primary possession have retained constructive possession until 1840 or thereabouts, that is until the time when evidence proves a second apparent interference to have taken place.

We do not find that this latter act of possession presents the character necessary to prescribe. It takes place under circumstances similar to the first act done before. The military authority repairs to the ground in question, and in order to get access to it they have to break through the wall of a neighbouring proprietor. The evidence does not shaw that they take possession of it *animo domini* and with a view of definitive occupation, but in presence of an emergency, and the cause of that occupation ceasing, the ground is abandoned again and the battery allowed to fall into decay.

It has been argued that the presence of the battery on the ground is proof of continuity of possession ; we cannot admit this argument, the presence of the battery proves past occupation, but subject to the qualifications attached to such a fact ; and the value of such evidence depends upon the circumstances under which that occupation has taken place ; whilst the fact of its being allowed to crumble down takes from it the character of unequivocal possession which the law requires.

We, therefore, find that at no time has the Civil Government possessed this ground so as to entitle the Defendant to claim, under them, the benefit of prescription.

For the same reasons we find that the War Department is not entitled to claim the prescription of Art : 2,265 under the provisions of that Article. The claim must be based upon title and possession for ten years between the present claimants ; the evidence shows no act of possession whatever of the War Department from 1841 and as we have expressed our opinion that the Civil Government has not proved sufficient possession, we are led to the conclusion, in the absence of any particular act of possession by the War Department, that they have failed to establish a legal claim to the ground in question.

We, therefore, find that the Plaintiff is entitled to Judgment, with costs.

SUPREME COURT.

SAISIE ARRÊT PAR AUTORISATION D'UN JUGE EN CHAMBRE.—DEMANDE EN VALIDITÉ.

Lorsqu'une saisie sera faite en vertu d'un Ordre du Juge en Chambre, pour assurer le recouvrement d'une créance contestée, la Cour ne prendra point connaissance de la demande en validité tant qu'elle n'aura point entendu la demande principale.

ATTACHMENT OF MONIES BY LEAVE OF A JUDGE AT CHAMBERS, — ACTION IN VALIDITY OF ATTACHMENT.

Where an attachment of monies is made by leave of a Judge's Order, to insure the payment of a contested claim, the Court will not hear arguments on the validity of the attachment until it has heard parties on the principal action.

LEBLANC, Plaintiff,

versus

ROBILLARD, Defendant.

Before :

His Honor the ACTING CHIEF JUDGE, and
His Honor Mr. JUSTICE ARNAUD,

P. L. CHASTELLIER,—Of Counsel for Plaintiff,
A. J. COLIN, —Plaintiff's Attorney.
G. GUIBERT, —Of Counsel for Defendant,
E. DUCRAY, —Defendant's Attorney.

21*st December* 1866.

This was a motion on behalf of the Defendant,

for the annullation of an Attachment laid by the Plaintiff, on some monies in the hands of Mrs. Blancard.

The motion was resisted by the Plaintiff.

Parties heard, and after due consideration of the arguments on both sides, the Court has come to the following conclusions :

1st ; That the Judge's Order, in the absence of a better title, is sufficient to warrant the laying on of an Attachment.

2ndly ; But that the existence of such an Order, *per se*, is insufficient for the validation of the Attachment.

3rdly ; That in the absence of a Judgment, on the principal cause, between parties, the Court is not in a position either to validate or to annul the Attachment in question, without endangering the rights of one or other of the parties to this motion.

The Court, accordingly, stays its Judgment on the merits of this present motion, until the principal cause shall have been dealt with on its being called for trial in its proper turn.

Leave, however, will be granted to the Defendant in this and in similar cases, to hasten the hearing of the principal and incidental causes,on his shewing, to the satisfation of the Court, the necessity of an earlier hearing.

SUPREME COURT.

ENFANTS NATURELS,—ADMINISTRATION LÉGALE DES PÈRE ET MÈRE,—APPEL D'UN JUGEMENT DU MASTER.

Les père et mère naturels ont l'administration légale des biens de leurs enfants.

NATURAL CHILDREN,—LEGAL ADMINISTRATION OF THEIR GOODS AND PROPERTY BY THEIR FATHER AND MOTHER,—APPEAL FROM A JUDGMENT OF THE MASTER.

The father and mother of natural children are by law entitled to the administration of their goods and property.

AUPSON,—Appellant,

versus

VICTOIRE AND ORS.—Respondents.

Before :

His Honor the Acting CHIEF JUDGE and
The Honorable Mr. JUSTICE BESTEL.

W. NEWTON, —Of Counsel for Appellant.
H. BERTIN, —Appellant's Attorney.
P. L. CHASTELLIER,—Of Counsel for Respondents.
U. HITIÉ, —Respondents' Attorney.

21*st December* 1866.

In the matter of the sale by levy of an immoveable property in the District of "Rivière du Rempart," prosecuted by one Dagorne Victoire against one Marie Victorine Paul, also called Marie Victoire Paul, the Widow of the late Toussaint Adolphe Moutou, the now Appellant petitioned the Master of the Court, in the capacity of Administratrix of the goods and properties of her several infant children, for the withdrawal of the whole of the immoveable property belonging to her infant children, from the subject seized by the said Dagorne Victoire, on the said Widow Moutou.

Upon hearing W. NEWTON, of Counsel for the now Appellant, and P. L. CHASTELLIER of Counsel for the now Respondents, the Master decided as follows :

"That the Plaintiff, now Appellant, had no "*persona standi*, as she has not the legal admi- "nistration of the rights of her natural children. "I dismiss the Application, with costs against "the said Plaintiff, now Appellant."

Was the Master right in thus viewing that the natural mother had no *persona standi* in the cause, she not having the legal administration of the rights of her natural children ?

The letter of the law, at first sight, seems to bear out the construction put upon it by the Master who has sided with the many commentators of the text of Art : 383 C. C.

There are, however, a lesser number of writers who have taken a different view of the matter, whose reasons in support of the contrary conclusion arrived at by them, is entitled to great regard.

The argument in support of the Master's decision rest on the text of Art. 383 of the C. C.

"Les articles 376, 377,378 et 379 seront com- "muns aux pères et mères des enfants naturels "légalement reconnus."

Or, in other words, the natural father or mother, or both, are assimilated to the legitimate father or mother, or both, as to the rights of correction conferred on the latter by the several articles stated in Article 383.

In referring to the "motifs du CODE CIVIL, in the report made to the Tribunat on the law on the "Puissance Maternelle" by the Tribun VESIER, Motifs Vol. 3, No. 32 page 196) we find that article 383 is an innovation on the old law, and we are told the necessity of the innovation.

The report says :—

" L'article 383 introduit un droit nouveau en " assimilant, quant aux moyens de correction, les " enfants naturels légalement reconnus aux en- " fants légitimes, puisqu'il leur applique les dis- " positions des articles 376, 377, 378 et 379."

" Vous ne serez pas alarmés de cette innova- " tion, Tribuns, elle est puisée dans la nature. " Si elle ne se trouve pas dans notre législation " actuelle, c'est parceque dans le droit Romain, " l'adoption ou la légitimation, qui pouvait seule " donner aux pères la puissance paternel e, *toute* de " *droit Civil*, est une conséquence forcée de notre " nouvelle législation sur ces enfants naturels, " qui a étendu leurs droit et amélioré leur sort."

" Déjà, dans le titre du mariage, vous avez " exigé, pour l'enfant naturel qui se marie, le " consentement de ses père et mère naturels qui " l'auraient reconnu légalement. Pourquoi la loi " refuserait-elle aux parents tous les moyens de " faire respecter une autorité que nous recon- " naissons être, en grande partie, fondée sur la " nature ?"

And, we may add, why should natural parents be entrusted with a power of correction merely, and be deprived of the power of protecting their issue, standing in as great a need of that protection as legitimate children ? Or, in words of DALLOZ : " Si l'on veut raisonner logiquement, " on sera obligé de reconnaitre que le droit d'au- " torité, de la part des père et mère sur les en- " fants naturels, implique le droit de les élever ; " l'éducation implique le droit de garde et le " droit de correction. Le droit d'autorité, le " droit de garde, le droit de correction et l'obli- " gation de donner aux enfants naturels de l'é- " ducation, implique, par voie de conséquence, " l'administration et même l'usufruit de leurs " biens." (DALLOZ, *Rep.* Vol. 38, No. 196, page 603).

But, without going to the extreme length suggested by this writer, in holding natural parents entitled to the *usufruct* of the property of their minor children, which is not necessary for our present purpose, why should natural parents be deprived of protecting (or administering) the rights as well as the persons of their issue ?

Can a more anxious and efficacious protection be expected from a stranger ? Surely not ; and unless the conduct of the parents be such as to require that the children should be confided to more moral or faithful hands, (Art. 444 C. C.) why should not the parents be entitled to the preference over strangers ?

The parents' affection and anxiety are sure to lead them to greater exertions and to a more watchful care over their children's persons and property than can reasonably be expected from a stranger.

The judicial construction of Article 383, C. C., advocated by the majority of commentators, cannot fail leading to conclusions highly detrimental of the rights of natural parents, and to the interest of natural children, whose welfare the legislature had so much at heart on framing Article 383.

If natural parents are only entitled to the right of correction, (Art. 383 C. C.) and no other right, they must, of course, be without right to require, from their natural issue, that honor and reverence arising from the "Puissance paternelle." (Article 371 C. C.) They ought to be without right to emancipate their issue. (See Arts. 372 373, 374 and Article 477 C. C.—GILL. Note 3.) No alimony will be due or demandable between natural parents and natural issue. (Arts. 203-205 C. C.)

These mischievous consequences lead us to the inference that such could never have been the intention of the legislature.

That there should be a broad line of distinction between the status of a non-married couple as also between the legitimate and non-legitimate issue, is at once rational and judicious.

That distinction has been kept up throughout the CODE. But there are however some rights and duties which must be common to legitimate or natural parents and children, such as the right of parental authority, parental duty of protection of the person and property, of correction, and maintenance of their children, reverence on the part of the legitimate or natural child for his parents ; the obligation of providing for the wants of their aged or helpless parents.

The interest of society and sound morality require that parents should enjoy these several rights, and discharge the duties correlative thereto ; as also that the children should show reverence to their parents and minister to their wants as a feeble return for the care bestowed on them from their infancy up to the time of their majority, when matured reason and gratitude will then lead them cheerfully to continue unto their parents an affectionate regard for their feelings, wants and comfort.

Such are the reasons which have led us to put on the enactment of Art. 383 C. C. that liberal construction which appears to us so consonant to the intention of the legislature and consistent with the promptings of nature, sanctioned, as they are, by the Divine law.

We regret that the Master should not have favoured us with the reasons which have led him to the conclusion that a natural parent, not having the administration of her children's property, the Appellant had, therefore, no *locus standi* to move for the distraction prayed for.

However, after mature consideration of the arguments *pro* and *con*, on this highly controverted point of law, we feel ourselves called upon to allow this Appeal, with costs.

BAIL COURT.

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RÉSOLUTION DE VENTE,—DOMMAGES,—DÉTÉRIORATIONS ET AMÉLIORATIONS,—COMPENSATION,—FRUITS ET INTÉRÊTS,—RENVOI DEVANT LE MAGISTRAT DE DISTRICT DES SEYCHELLES POUR ÉTABLISSEMENT DE COMPTES, SUR APPEL,—FRAIS.

Les preuves contenues au Record étant insuffisantes pour fixer le montant des dommages et des améliorations allégués, la Cour a renvoyé les parties devant le Magistrat de district des Seychelles pour établir leurs comptes respectifs, les frais réservés jusqu'au jugement définitif.

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CANCELLATION OF SALE,—DAMAGES,—DETERIORATION AND IMPROVEMENT,—COMPENSATION, COMPUTATION OF FRUIT AND INTEREST,—REMIT, ON APPEAL, TO THE DISTRICT MAGISTRATE OF SEYCHELLES FOR ADJUSTMENT OF ACCOUNTS,—COSTS.

The evidence as appears from the record, being unsufficient to satisfy the Court of the amount of damages, if any, suffered through deterioration, and of the value of improvement made, so as to establish a compensation between the parties, they are referred to the District Magistrate of Seychelles, to adjust their respective claims. Costs reserved.

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LOIZEAU AND ANOR,—Appellants,

versus

WIDOW SAVY AND ORS,—Respondents.

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Before:

His Honor the ACTING CHIEF JUDGE.

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V. NAZ, —Of Counsel for Appellants.
E. LAURENT, —Appellants' Attorney.
L. ROUILLARD,—Of Counsel for Respondent.
J. PIGNÉGUY, —Respondent's Attorney.

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20*th November* 1866.

This was an Appeal from the District Court of Seychelles, cancelling a sale made by Savy to Loizeau, of an estate known by the name of *Beau Vallon*, of the half of a house, and of the half of a shop, situate at Mahé, Seychelles, for the lump sum of $12,000.

The purchaser had paid $9,000 of his purchase price, and owed the balance of $3,000, which, remaining unpaid, led the Respondents to sue for the cancellation of the sale of *Beau Vallon* Estate and of the house, the shop being no longer in existence.

The Magistrate decreed the cancellation prayed for (viz:) by allowing the Plaintiffs below and now Respondents, to retain the $9,000 paid in part of the purchase price, as damages for the difference between the value of the estate and house, at the date of sale, and at the date of the demand in cancellation. I have in vain looked in the evidence sent up, for a sufficient and satisfactory proof of the Respondents having sustained damages to the amount allowed by the Magistrate; and however anxious finally to deal with the matter to prevent further litigation and expense, I find myself unable to do so from want of the necessary data to assess the damages sustained, if any.

On one side it was said that certain things which contributed to the value of the Estate had been removed; that some of the buildings had been allowed to go to ruin.

On the other side it was asserted that the things removed had been replaced by others of greater value, and if certain buildings had been allowed to decay, new buildings had been erected in their lieu and stead.

It is clear that to arrive at a satisfactory conclusion as to whether any damage has been sustained, we must ascertain how far the alleged diminution in the value of the estate and house is or is not compensated by the improvements alleged to have been made. An account must be taken of the fruits derived by the Plaintiff from the landed estate and house purchased up to the day of the cancellation of his purchase; as also an account of the interest derived by the vendor, from the $9,000 received by him, on account of his sale price.

Not having the necessary data in the record, to ascertain these several points, I am driven to the necessity of referring parties to have these several points ascertained, and in order that I may not be misunderstood, parties are referred to *précompter* before the District Magistrate of Seychelles, by or before the 18th February 1867, who in making up the account between parties, is to value the amount of the alleged deteriorations, of the alleged improvements, of the fruits derived by the Appellants, as above, and of the interest derived by the Respondents, of the sum of $9,000, from the date above mentioned.

In the meanwhile the Magistrate is hereby empowered to take the necessary steps for the preservation and protection of the properties above mentioned.

Costs reserved to be disposed of, with the merits, by this Court, on the Report of the District Magistrate, as aforesaid.

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SUPREME COURT.

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CESSION DE BIENS,—COMPENSATION,—JUGEMENT INTERLOCUTOIRE,—RENVOI DEVANT LE MASTER.

Renvoi devant le Master pour rechercher à quelle époque certains billets offerts en compensation d'une dette réclamée par les Syndics d'une Cession de Biens sont devenus la propriété de celui qui les offre en compensation.

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"CESSIO BONORUM,"—SET OFF,—INTERLOCUTORY ORDER,—REMIT TO THE MASTER.

Where a party wished to have it found by this Court that he was entitled to set off certain promissory notes in his possession against a debt which he owed to an estate under Cessio Bonorum, the Court pronounced an interlocutory order, remitting to the Master to ascertain from the papers before the Court and in the proceedings in Cessio Bonorum, whether other parties had claimed on the notes, and at what dates.

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LAURENT,—Plaintiff.

versus

CAMPBELL AND ORS.,—Defendants.

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Before:

His Honor the CHIEF JUDGE and
The Honorable Mr. JUSTICE COLIN.

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J. COLIN, —Of Counsel for Plaintiff.
E. LAURENT, —Attorney for himself.
HON. L. ARNAUD,—Of Counsel for Defendants.
J. PIGNÉGUY, —Defendants' Attorney.

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16*th October* 1866.

In this case, some questions of great and general importance are raised for Decision. The Plaintiff concludes to have it found and declared by the Court, that he is entitled to set off a large amount of promissory notes due by the Estate and the heirs Lanougarède against a debt due by him to that Estate, of between $40,000 and $50,000.

In defence it is pleaded that the heirs Lanougarède, having found the position of the Estate to be very greatly embarrassed towards the close of last year, had filed a petition for *Cessio Bonorum*, on the 12th December last; that this fact, in connection with certain statements which the Defendant made as to the way and manner in which the Plaintiff had become possessed of all or at least of some of the promissory notes which he wished to set off against his debt owing to the Estate, and as to the dates at which he became possessed of them, were very material, in considering and determining the legal position of parties.

The Court, in the course of the long discussion which the case underwent at the Bar, repeatedly pointed out to the Counsel, on both sides, the desirableness of having proper evidence submitted in support of the allegations which the parties respectively deemed important in support of their legal pleas.

The Plaintiff stated that he considered he was entitled to stand on certain legal presumptions with respect to the notes in question and that he did not require any additional or substantive proof in support of his case. The Defendants contended, *inter alia*, that this Court, on its Bankruptcy and Insolvency side, had ample materials before it for ascertaining the truth of their allegations, as all the proceedings in the *Cessio Bonorum* of the "Heirs Lanougarède" and of "Eugène Bazire," were matter of record in the Supreme Court, of which the Judges are bound to take judicial cognizance.

We now know what the promissory notes are, to which the Plaintiff Laurent alleges he has right, and by a simple mechanical operation it can be ascertained if those bills, or any of them, were claimed upon, in the above cases of *Cessio Bonorum*, by other parties and at what dates.

We shall, therefore, make an interlocutory Order, authorizing the Master to certify to the Court, within one month from this date, which, if any, of the promissory notes founded on in this case, were claimed upon by other persons and at what dates.

All rights and pleas of parties and questions of costs reserved.

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SUPREME COURT.

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ORDRE,—CONTREDITS,—APPEL D'UN JUGEMENT DU MASTER,—DÉLAI,—COMPÉTENCE DU JUGE EN CHAMBRE.

Lorsqu'il est fait appel d'un Jugement du Master pendant les vacances, l'Intimé peut être assigné à comparaître devant la Cour Suprême, le premier jour de motions du terme suivant ou devant un Juge en Chambre pour un jour quelconque pendant les vacances, après les huit jours réglementaires qui sont accordés pour faire appel.

Le Juge en Chambre peut entendre l'appel ou le renvoyer devant la Cour.

Le Créancier qui a requis un Ordre dans lequel ont été faits certains Contredits, et dont la créance n'est point contestée, peut néanmoins continuer la procédure d'Ordre et faire fixer un jour pour plaider sur les Contredits. C'est alors aux créanciers dont la créance est contestée à réclamer la mise hors de cause de toutes les créances non contestées.

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ORDRE,—CONTREDITS,—APPEAL FROM A JUDGMENT OF THE MASTER,—DELAY,—JURISDICTION OF A JUDGE AT CHAMBERS.

On an Appeal from a Judgment of the Master, in vacation, the notice with Summons may be made

returnable before the Supreme Court on the first motion day of the term next ensuing or before a Judge at Chambers on any day, during the vacation after the usual delay of appeal in such cases.

A Judge in Chambers may hear the Appeal in such cases or refer it to the Court, as to him shall deem fit.

A Creditor who has claimed the opening of an "Ordre" to which certain "Contredits" have been made, and whose claim has not been contested, may, notwithstanding, follow up the proceedings of "Ordre" and have a day appointed for argument on the "Contredits"; the Creditors whose claims are contested may then apply to have the Creditors whose claim is not contested put out of cause.

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GRACIEUSE,—Appellant.

versus

VIEAU,—Respondent.

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P. L. CHASTELLIER,—Of Counsel for Appellant.
U. HITIÉ, —Appellant's Attorney.
A. LEGALL, L. ROUILLARD, G. GUIBERT, } —Of Counsel for Respondent.
G. TESSIER, J. ACKROYD, M. SAUZIER, } —Respondent's Attornies.

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Cette cause est un Appel d'un Jugement du Master, rendu dans les circonstances suivantes: Le 4 Décembre 1866, Mme. Vieau, créancière, ayant requis l'Ordre du prix de vente de l'Immeuble Chéron présenta requête au Master pour obtenir une audience à laquelle seraient plaidés certains contredits faits au dit Ordre.

Le Master fixa l'audience demandée au 19 Décembre, et cette audience fut renvoyée au 11 Janvier 1867, date du Jugement dont est Appel.

Dans l'intervalle, le 12 Décembre, à la requête de la Banque Orientale, l'Ordre fut clos définitivement quant aux créances non contestées, parmi lesquelles celle de Mme Vieau.

Le 11 Janvier lorsque la cause fut plaidée devant le Master, M. Gracieuse, dont la créance colloquée au dit Ordre avait été contestée, objecta que Mme Vieau n'avait point qualité pour paraître comme demanderesse dans la cause, ayant été désintéressée, et que sa demande devait être rejetée, avec dépens. Le Master décida que Mme Vieau avait qualité et que les parties devaient plaider sur les fonds de l'affaire, c'est-à-dire sur la valeur des Contredits.

C'est contre ce Jugement qu'est dirigé le présent appel.

Les formalités de l'appel ont été observées dans les 8 jours réglementaires, mais les Intimés ont été assignés à comparaître le 29 Janvier, devant un Juge en Chambre.

Au jour fixé (29 Janvier) MM. A. LEGALL, L. ROUILLARD et G. GUIBERT, pour les Intimés, plaident que, par les arts. 166 et 169 des Réglements de la Cour, l'acte d'Appel devait assigner les parties à comparaître soit en Cour, le premier jour du terme prochain, soit en Chambre, pendant les vacances, pour le premier jour ouvrable qui suit les huit jours réglementaires.

Me P. L. CHASTELLIER, pour l'Appelant, dit que la loi ne fixe pas de délai.

JUDGMENT.

Par l'Art. 167 des réglements de la Cour, l'Appelant doit assigner l'Intimé à comparaître en Cour "le premier jour de motions qui suit les huit jours réglementaires si l'on est dans le courant d'un terme, et pour le premier jour du terme suivant si l'on est en vacances." Cette disposition est amendée par l'Art 169. Mais dans un sens seulement, c'est-à-dire que l'appel pourra être poursuivi pendant les vacances, devant un Juge en Chambre; le réglement ne dit pas pour quel jour l'Intimé sera assigné. Il est ainsi conçu: "Out of term an appeal from an order of the Master may be made *within the usual time* and the usual form to the Judge at Chambers, who shall deal with it, as to him shall seem fit." Fixer un délai fatal ce serait ajouter au réglement, et je suis d'autant moins disposé à le faire que le Réglement 167 donne à l'Appelant le droit d'assigner pour le premier jour de motions du terme suivant; et l'assignation dans les vacances étant pour un jour plus rapproché, les Intimés n'éprouvent aucun préjudice dont ils puissent se plaindre.

Quant à la question de savoir si le Juge en Chambre est compétent pour entendre et décider sur un appel, en vacances, je décide qu'il est compétent et ordonne de procéder sur le fond.

Après avoir entendu les avocats des deux parties, le Magistrat prononce le Jugement suivant:

Je suis d'opinion que la décision du Master doit être maintenue.

Il est à remarquer que l'Appelant n'a pas demandé au Master que Vieau et autres créanciers dont les créances ne sont pas contestées fussent mis hors de cause, ce qu'il avait le droit de demander quant à toutes les parties dont les droits se seraient trouvés alors irrévocablement fixés; il demande seulement une fin de non recevoir; or c'est Made. Vieau qui a requis l'Ordre; à l'époque où sa requête était adressée au Master (4 Décembre) ses droits n'etaient pas fixés, puisque la clôture partielle est postérieure (12 Décembre) il n'y a donc pas lieu de déclarer la requête de Made. Vieau non avenue.

J'eusse conçu que l'Appelant eut demandé au Master la mise hors de cause de toutes les parties dont les droits sont fixés, et de ne laisser en présence, au procès, que ceux dont les droits sont en contestation; il y aurait eu alors l'avantage d'éviter des frais inutiles; mais la demande étant de déclarer nulle la requête de Mme. Vieau, je suis d'opinion que le Master, en refusant de déclarer cette nullité, a bien jugé, et rejette l'appel, avec dépens.

PRIVY COUNCIL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON THE APPEAL OF

Serendat *versus* **Saïsse,**

From the Supreme Court of Mauritius, delivered 26th February 1866.

(Vide Suprá, Vol. III, Page 170 *& Vol. IV, Page* 4).

PRESENT:

LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

This was an Appeal against a Judgment of the Supreme Court of Mauritius, and also against an Order of the said Court, whereby a motion made, by the Appellant, for a new trial of the cause in which the said first mentioned Judgment was pronounced, was dismissed with costs.

On the argument before us, the latter branch of the Appeal was very properly, in our opinion, abandoned by the Appellant's Counsel, as hopeless.

The action was brought by the Respondent against the Appellant to recover damages for injuries sustained by the Respondent, by reason of his house and furniture having been destroyed through a fire kindled on the Appellant's land by labourers employed by him to clear the ground for agricultural purposes, which fire was so carelessly made that sparks and other burning particles were carried over and scattered upon the Respondent's premises, thus causing the fire which was the subject of complaint.

On the evidence adduced at the trial, the Court below came to the conclusion that the fire which destroyed the Plaintiff's house and furniture was communicated to it from the fire kindled in the Appellant's field, as alleged, and that this was owing to the negligence of the men employed by him to clear his ground. And we think the Court was fully justified by the evidence, in coming to this conclusion.

The only question, therefore, which remains is, whether the Appellant was responsible for the negligence of the men so employed by him.

The Respondent grounded his claim on the Article 1384 of the CODE NAPOLEON (which is the prevailing law of Mauritius) and which is in these words: " Les maîtres et commettants (sont responsables) du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés. "

The Respondent contended that the Appellant and the men he employed stood in the relation of *commettants* and *préposés* within the meaning of this Article. It is necessary, therefore, to ascertain what is the meaning of the word *préposé*. It appears from NAPOLEON LANDAIS's Dictionary that the meaning of the word " préposé " is, qui " est commis à quelque chose, qui en a la garde, " le soin ; " and in the same book the meaning ascribed to the verb *préposer* is " commettre, établir quelqu'un avec pouvoir de faire quelque chose ou d'en prendre soin. " And accordingly we think that, subject to the qualification hereafter to be mentioned, the word *préposé*, in the Article, means substantially, a person who stands in the same relation to the *commettant* as " domestique " does to " maître, " *i. e*, a person whom the *commettant* has entrusted to perform certain things on his behalf. This construction of the word appears to be supported by a passage in DALLOZ's Repertoire Vol. XXXIX, page 440, No. 689, where he says : " Les domestiques sont une classe particulière de préposés. "

The French lawyers, however, in their interpretation of the Article, have qualified the above construction by the doctrine that in order to make the *commettant* responsible for the negligence of the *préposé*, the latter must be acting " sous les ordres, sous la direction et la surveillance du commettant. " This doctrine is certainly supported by the French authorities to which we were referred by the Counsel for the Appellant, viz: DALLOZ Répertoire, tit. Responsabilité, chap. III, sect. 2, article 5, and the three cases of *Sesto v Salles and the Mining Company of the Grand Combe*, and *The Northern Railway of France v Boisseau* and *The Administration of Forests v Martin*, which were decided by the COUR DE CASSATION, and are cited in DALLOZ. " Jurisprudence Générale " and copies of which were supplied to us by Counsel.

Applying this doctrine to the present case, the Appellant's contention is, that the evidence shows he had parted with the control over the men he employed, and that they were not working under his orders, directions, and surveillance.

The evidence was that the Appellant, in order

to clear his ground of weeds and brushwood, employed two bands of Indian labourers one of which was under an Indian named Beesapa, and the other band consisted of four men, who were under an Indian named Joondine, and included a man called Beedhoo, who appears to have been the author of the mischief, by setting fire to a heap of rubbish collected in the course of the work, so that the fire extended to some sapan trees. The object of setting fire to them was, as Beedhoo expressed it in his evidence, "to work more easily." The work was to be paid for by the piece, *i. e.* so much per acre. The evidence leaves it doubtful whether the Appellant was to pay the price to Joondine alone, or to him and the other Indians in his band; indeed, the Court below said the evidence rather led them to the conclusion that the contract was directly with all the Indians.

On this evidence, it was contended on the behalf of the Appellant that he is shown to have severed himself from the execution of the work and parted with all superintendence and control over the persons by whom it was performed.

But we are of opinion that this is not a conclusion which is warranted by the evidence. Having regard to the nature of the work and the condition of the men employed, it appears to us unreasonable to infer that the Appellant had parted with the power of correcting, as the work went on, the mode in which it was performed, and of dictating what kind of brushwood and other growth was to be removed, and what was to be left standing, and how the weeds and brushwood which had been got up were to be dealt with, and where they were to be deposited; in other words, we think the evidence does not show that the general control, direction, and surveillance of the operations was relinquished by the Appellant, by reason of the agreement he had made with the Indians. It may be observed that these men do not at all answer, the description given by SIREY ("Codes Annotés", vol. 1, page 665) of "ouvriers d'une profession reconnue et déterminée;" they were ordinary labourers characterized, by the Court below, as "a set of idle careless semi-barbarians."

The view we have thus taken of the relation established by the agreement between them and their employer is corroborated by the evidence which shows that in point of fact the Appellant did interfere and control the men in the course of the work. For example it was said by Joondine (Record p. 16) "Mr Serendat told me not to put fire in the place where I was working,"..... "he told me to put fire in another place which he pointed." Again, Beesapa says (Record p. 15), "the previous day Mr. Serendat had come and told Joondine to leave that portion of ground which is fifty dollars, and go and work in the interior of the field." And the Appellant's answer (Record p. 5) states that he had given order, five or six days before, to burn some weeds, but that he also gave orders that the fire should be carefully extinguished.

Looking, then, at the whole case, we are of opinion that the Appellant and the Indian whose negligence caused the fire stood in the relation of *commettant* and *préposé*. And, as it has not been disputed that the negligent act was done by the *préposé*, in the course of his employment, it follows that the responsibility of the Appellant is made out.

It remains to be observed that the Declaration in this case is not framed at all with reference to the Article of the Code, but charges in the ordinary form that the servants and agents employed by the Defendant were guilty of negligence. But we think that the words "servants and agents" must be read in a sense which will support the Declaration, viz.: servants and agents acting under the directions, orders and surveillance of the Defendant.

For these reasons, their Lordships will humbly recommend to Her Majesty that the Judgment of the Court below be affirmed, with Costs.

PRIVY COUNCIL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON THE APPEAL OF

Her Majesty's Procureur & Advocate General for Mauritius

versus

Bruneau,

From the Supreme Court of Mauritius, delivered 18th June 1866.

(*Vide Suprà, Vol. IV, Page 9*).

PRESENT:

LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.

This case has come before us upon an Appeal brought on behalf of the Government of the Island of Mauritius, from a decision of the Supreme Court of that Island. The question decided by that Court and which is raised by this Appeal, relates to the right of succession to the property of Pierre Bruneau, deceased.

Pierre Bruneau was a natural child of his father and mother, recognized by them. He had a brother and two sisters, also natural children of the same father and mother, and also recognized by them. His father and mother had no legitimate descendant. His father and mother, and his brother and sisters all died in his lifetime. His sisters had no descendant; his brother had two natural children: Virginie Bruneau and Elodie Bruneau, who were recognized by their father; but he had no lawful descendant. Upon the death of the brother, his two natural children, Virginie Bruneau and Elodie Bruneau, went to live with their uncle, Pierre Bruneau, and they continued to live with him down to the time of his death. He had been married, but he had no legitimate descendant, and his wife had predeceased him. He died intestate, leaving the two natural children of his natural brother, him surviving. Elodie Bruneau, one of these children, has since died, having duly constituted her sister, Virginie Bruneau, her universal legatee. Upon the death of Pierre Bruneau, the question arose whether the natural children of his natural brother were entitled to succeed to his property, or whether the right to succeed to it belonged to the Government of the Island. This question formed the subject of the proceedings which have led up to this Appeal. It was decided by the Supreme Court of the Island in favor of Virginie Bruneau, the surviving natural child of the natural brother, and it is from this decision that the Appeal before us is brought.

This question is purely one of French law, depending upon the provisions of the "CODE CIVIL," which is in force in the Island of Mauritius and constitutes the law of that Island. It is admitted on all hands to be a question on which there has been no recorded decision in the Courts of France, and as it is one of importance and of great difficulty we cannot but regret that means have not been provided for enabling us to obtain the decision of the French Courts upon it, as they must be more familiar than the Judges of this country can be with the language and provisions of the "CODE CIVIL." We have however, endeavoured to obtain—and, from our own resources, and through the kind assistance of a gentleman of the French Bar,—have, as we believe, obtained all the materials which can enable us, or which could have enabled the French Courts, to form a Judgment upon the subjects;

And we have given the case our most deliberate and anxious consideration. We proceed, therefore to state the conclusion at which we have arrived, and the reasons on which that conclusion is founded.

Before entering upon the consideration of the particular articles of the Code, on which this question must ultimately depend, it is, as it has seemed to us, important to consider the general principles by which the Courts are to be governed in the construction of the Code. These principles, as laid down by the Court of Cassation, and the leading text writers of France, are con-

veniently collected in the 3rd section of Sirey's note upon article 1 of the Code; and we select the following articles of that note as bearing more particularly upon the question before us:

111. Les tribunaux ne peuvent, là où la loi ne distingue pas, créer des distinctions qui en altèrent le sens. Ce principe est élémentaire en droit: une foule de décisions en ont fait l'application.

112. Ils ne peuvent non plus, lorsque le sens de la loi est positif et certain, se dispenser de l'appliquer telle qu'elle est: il ne leur appartient pas de la modifier ou restreindre par aucune considération, quelque puissante qu'elle soit.

112 *bis*. Et bien qu'une erreur se soit glissée dans le texte d'une loi, les tribunaux n'en doivent pas moins appliquer la loi telle qu'elle a été publiée: il ne leur appartient pas de rectifier l'erreur.

113. On ne peut se prévaloir des motifs d'une loi contre le texte de sa disposition.

114. L'application spéciale d'un principe général à un cas particulier n'emporte pas dérogation virtuelle à ce principe pour tous les autres cas.

119. Les lois spéciales doivent être entendues selon leur propre système, sans y ajouter les règles du droit commun.

It results, we think, from these principles, that in determining this question we are to be guided by the plain sense of the law which applies to the question; that we are to make no distinction which can alter that sense; that, assuming the sense of the law to be positive, we are not to modify or restrict the law; that we are not to weigh the reasons of the law against the words of it; and (which, perhaps, is more pertinent in its bearing upon the present case) that if the law applicable to the case be special, we are to understand it according to its particular scheme (propre système) without adding to it the rules of what is called the common law.

Guiding ourselves, then, by these principles, let us first consider the Chapter of the Code on Irregular Successions on which this question principally, if not wholly, depends. The chapter, it is to be observed, deals with two distinct subjects—the rights of natural children in the property of their father and mother, and the succession to natural children dying without posterity. Articles 756 to 764, inclusive, apply to the former of these subjects; Articles 765 and 766 to the latter of them.

We pass by, for the present, the consideration of the Articles 756 to 764, and proceed to consider the Articles 765 and 766, as they stand by themselves. These two Articles are in these terms:—

765. La succession de l'enfant naturel décédé sans postérité est dévolue au père ou à la mère qui l'a reconnu; ou par moitié à tous les deux, s'il a été reconnu par l'un et par l'autre. (L. 2, § 1, ff. *ad Senat. Tertull*; L.L. 2, 4, 8, ff. *Undè cognati*.)

766. En cas de prédécès des père et mère de l'enfant naturel, les biens qu'il en avait reçus, passent aux frères ou sœurs légitimes, s'ils se retrouvent en nature dans la succession; les actions en reprise, s'il en existe, ou le prix de ces biens aliénés, s'il en est encore dû, retournent également aux frères et sœurs légitimes. Tous les autres biens passent aux frères et sœurs naturels, ou à leurs descendants.

We have here, therefore, a distinct and positive law that, in such a case as the present, that of a natural child dying without posterity, and of the father and mother of the natural child having died in his life time? the property of the natural child, not received from the father and mother, shall go to his natural brothers and sisters—"ou à leurs descendants." There is no restriction or limitation on the word "descendants." We are not here dealing with a law which, like our own law, says that an illegitimate child is "nullius filius." The law we have to deal with is a law which admits certain claims of illegitimate children when recognized by their parents, which acknowledges the relation between illegitimate children and their parents, and between the illegitimate children themselves. *Primâ facie*, therefore, it is difficult to see upon what ground a limit ought to be put upon the meaning of the word "descendants," or why those who are recognized by their parents as their children, and whom the law recognizes as their children, should not be held to stand in that character, or be deemed to be "descendants" of their parents within the meaning of these Articles. The context of the Articles does not appear to us to support any such view. It cannot, we think, be disputed, that the words "postérité" and "descendants" are used in these Articles as convertible terms; and it cannot surely be denied that recognized illegimate children, according to the provisions of the French Code, fall within the description of posterity of their parents. But what is more remarkable in these Articles is this: that, except as to property derived from the father and mother, legitimate brothers and sisters are wholly excluded from the succession to the property of a natural child, and are so excluded in favour of the natural brothers and sisters of a natural child; and we cannot but think that it would be a strange construction of these Articles to hold that, although legitimate brothers and sisters are thus excluded in favour of natural brothers and sisters, the word "descendants" should so be construed as to apply only to legitimate descendants, and thus exclude natural descendants in favour of legitimate descendants. Yet this is the length to which the Appellant's argument must be carried in order to maintain this Appeal.

Taking, then, the case to depend upon these two Articles alone, we think there could be little, if any, doubt that natural children ought to be considered as "descendants" within the meaning of these Articles. It was said, indeed, on the part of the Appellant, that the word "descendants," *ex vi termini*, signifies those who are capable by law of succeeding; that it, of necessity, refers to the known legal course of inheritance: but however this may be, when the word is applied to a settled and recognized course of des-

cent, it cannot, we think, be so when it is applied to a line of succession newly created by law, and created in favour of persons not falling within the settled and recognized course of descent. At all events, we think that this position on the part of the Appellant cannot be supported against the opposing indicia of intention to which we have referred. The argument on the part of Appellant, however, was mainly rested upon the other portions of this Chapter on "irregular successions," and upon other Articles of the Code. We shall presently refer to these arguments; but before doing so, we think it right to observe that, in our opinion, too much weight ought not to be attached to arguments derived from these sources. We are not disposed to go the length of saying that one part of the Code cannot be resorted to for the purpose of explaining another part of it; but articles 765 and 766 may well be considered to constitute and, in our opinion, do constitute, a special law for determining the succession to natural children dying without posterity; and looking to the rules laid down for the interpretation of the Code, we think that special laws ought, as far as possible, to be construed according to the terms in which they are expressed, without either the general laws or the terms of other special laws being called in aid for the construction of them. We should hesitate, however, to dispose of this Appeal upon this ground alone or without referring to the very able arguments which were urged at the Bar, in support of it.

These arguments were partly founded upon article 756 of the Code. That article is as follows:—

756. Les enfants naturels ne sont point héritiers; la loi ne leur accorde de droit sur les biens de leur père ou mère décédés, que lorsqu'ils ont été légalement reconnus. Elle ne leur accorde aucun droit sur les biens des parents de leur père ou mère. (Inst. l. 3, t. 4, § 2; L. 2 et 8, ff. *Undé cognati*, Nov. 89 Cap 2;—C. C. 334 et S. 908.)

This article is relied upon as establishing two points: 1st, that natural children have not the character of heirs; and 2ndly, that they cannot by law, take any part of the property of the relations of their father or mother. But although natural children have not the character of heirs, the law nevertheless accords to them certain rights and interests (which are defined by Articles 757 and 758) in the property of their parents; even as against the legitimate descendants of those parents, and still greater rights and interests against the other relations of those parents. It makes a wide and marked distinction between legitimate and natural children, attaching to the former the character of heirs, and refusing that character to the latter, but it by no means treats the latter as having no connection with or no claim upon the property of their parents; and this, we think, tends much to elucidate the provisions against natural children taking the property of the relations of their father or mother. Such property may well have been considered as family property to which natural children, not being regarded as members of the family, had no right to succeed. We do not, therefore, feel ourselves much pressed with the arguments founded upon Article 756.

The main stress of the Appellant's argument, however, rested upon the 759th Article of the Code, and upon the interpretation put upon it in the case of *Billard v. Billard*, and upon the opinions of the great majority of the commentators upon the Code, in conformity with that decision. This Article is in these terms:—

759. En cas de prédécès de l'enfant naturel, ses enfants ou descendants peuvent réclamer les droits fixés par les articles précédents. (L. 4 ff. *Undé cognati.*)

Looking to the decision in *Billard v. Billard* and to the opinions of the commentators to which we have referred, it would not, we think, be right for us to suggest any doubt upon the meaning of the word "descendants" in that Article. We think that the word as used in that Article, must be taken to mean "descendants légitimes," and that natural children could not claim the benefits given by this article. The argument founded upon this article is therefore well deserving of consideration; and perhaps it might be held to decide this case if this article and Article 766 had reference to the same subject and to the same state of circumstances. But not only do these Articles constitute distinct laws, but they refer to wholly different states of circumstances. The one refers to the property which natural children have taken from their parents; the other, to the property of the natural children themselves, not derived from their parents. The one deals only with the substitution of the children or descendants of predeceased natural children for the natural children themselves: it refers, as we understand it, to property which has never come to the natural children themselves, and involves, therefore, no other question than this: whether the children or descendants taking by substitution are to be legitimate children or descendants only? The other extends to the disposition, and, as it seems to us, to the complete disposition of the property of the natural children themselves, and gives it to their natural brothers and sisters, "ou à leurs descendants," thus providing for what has not, as far as we can see, been before provided for, the devolution of the property of natural children dying without legitimate or illegitimate descendants. These circumstances are, we think, sufficient to prevent the construction of the word "descendants" in the latter of these Articles, being governed by the construction which has been put upon it in the former of them.

The provisions of the chapter on representation were also referred to on the part of the Appellant, in support of the argument upon 759th section; but what we have already said upon the principal argument meets this argument also. It was further attempted on the part of the Appellant to draw some argument from the 767th and 768th Articles of the Code, but these Articles do not seem to us to refer to irregular successions. They refer, as we think, to the regular order of succession, taking it after the failure both of legitimate and illegitimate children, and after the exhaustion of the rules applicable to succession in such cases.

Another argument, which was much relied upon on the part of the Appellant, was, that the construction contended for on his part would render the whole Code uniform and consistent; whereas the construction on which the decision appealed from proceeds would, as it was said, render the different parts of the Code conflicting and inconsistent. But this argument in favour of uniformity is, we think, entitled to but little, if any, weight, when it is attempted to be applied to different parts of the Code having reference to wholly different states of circumstances, more especially having regard to the rules of construction to which we have referred. Even upon the construction contended for by the Appellant, the Code would be, by no means, uniform in its effects; for, supposing legitimate children only to take under the 766th Article (which is what the Appellant contends for), they would not take in the same manner or to the same extent as they would take under the other Articles. They would, as it seems to us, take, under the 766th Article, only property not received by the natural brother or sister from his parents. The property received from the parents would be subject to the *droit de retour*.

The difficulties which would arise upon the construction which the Courts of the Island have adopted were also much relied upon on the part of the Appellant. We are by no means unaware of these difficulties. If there be legitimate children, the illegitimate children may take nothing, or they may take equally with the legitimate children, or they may take the portions prescribed for them by Article 757. But these are not the questions before us, and we give no opinion upon them. If the natural children are descendants within the meaning of Article 766, they are not less qualified to take, because in certain events they may take nothing, or may take equally with the legitimate children, or may take only a portion of the share to which they would have been entitled had they been legitimate. The true question in this case is, whether, as between them and the State, they are entitled to take; and we are of opinion that upon the true construction of the Code they are so entitled. We think so both for the reasons which we have assigned and for the reasons which are assigned in the very able Judgment of the Court in the Island, to which the following observations may be added.

It is clear from Article 723, that in the case of regular succession the State takes only after failure both of legitimate and illegitimate children. It is equally clear that, under Article 766, the natural brothers and sisters, if surviving, would have taken, and the question, therefore is, in fact, a question of succession to or substitution for a natural brother or sister. Could it have been intended that the State should be put in a better position against natural children, whose parents would have taken, by a construction to be put upon the word "descendants", confining it to legitimate children? We think that had there been any such intention in favour of the State, it would have been clearly and definitively expressed. We admit the case to be one of great difficulty, and that the opinions of the commentators upon the question are conflicting, and to such a degree that it can hardly be said to which side the greater weight is due; but upon the whole we think that the better reasons are in favour of the Respondent, and we agree in the Judgment appealed from. We shall, therefore, humbly recommend Her Majesty to dismiss this Appeal, and to dismiss it with costs.

I

COUR DE DISTRICT DES PAMPLEMOUSSES.

Audience Civile du 23 Octobre 1866.

PRÉSIDENCE DE M. ADOLPHE AUTARD DE BRAGARD.

VALAYDON v. FAHELAUB.

Me. LABISTOUR, POUR LE PLAIGNANT,
Me. PELLEREAU, POUR LA DÉFENSE.

A l'appel de la cause Me Pellereau prend exception à la jurisdiction du tribunal sur le motif que le défenseur demeure au quartier de Flacq et qu'on aurait dû l'assigner devant son juge naturel c'est-à-dire devant le Magistrat de ce district. Il fait entendre des témoins qui prouvent que le défendeur son client demeure de l'autre côté de la Rivière du Rempart et du Pont Praslin en se rendant de Port-Louis à la Grand'Rivière Sud Est, et près de la propriété *Australia* ; endroit qui a été toujours considéré par les habitants qui y résident comme faisant partie du district de Flacq. C'est devant le Magtstrat Stipendiaire de Flacq que se font les engagements de laboureurs, et devant l'officier de l'Etat Civil de Flacq que se font les déclarations de naissance et de décès et les actes de mariage.

Me Pellereau expose alors que la limite entre les quartiers de Flacq et des Pamplemousses est formée par le lit de la Rivière du Rempart et toute personne demeurant de l'autre côté du Pont Praslin dans la direction de la Grand'Rivière Sud Est est du quartier de Flacq. La ligne de démarcation entre les districts de l'île est généralement mal définie et devrait être précisée par une loi, mais toutes les tentatives faites pour arriver à ce résultat ont jusqu'à présent échoué, et les pouvoirs publics sont obligés pour reconnaître l'étendue de leur juridiction d'avoir recours à d'anciennes lois souvent confuses et toujours difficiles à appliquer. —Dans plusieurs cas aucun arrêté ne fixe leurs limites. Cependant il croit que par rapport aux quartiers de Flacq et des Pamplemousses, la délimitation est clairement tracée. D'après l'Ordonnance royale du 1er Août 1768 (Code Delaleu, page 32) le district de Flacq est abornè du côté de la Villebague par les profondeurs de la Rivière du Rempart et cette loi est confirmée par l'arrêté du Général Decaen du 14 fructidor an XII (Code Decean No. 73) qui ordonne que le quartier des Pamplemousses soit limité par la Rivière du Rempart. D'où il résulte que cette rivière est la limite des deux quartiers et que le défendeur demeurant à la Plaine des Roches, c'est-à-dire à Flacq, le tribunal des Pamplemousses est incompétent.

Le défenseur ajoute que fixer une autre limite ce serait jeter la perturbation dans les actes judiciaires et les actes de l'Etat Civil qui ont été faits dans la croyance que la ligne de séparation de deux quartiers avait été tracée ainsi qu'il l'avait indiqué en se fondant sur la loi qu'il vient de citer.

Me Labisteur, avocat du Plaignant, répond que l'opinion générale et la coutume ont toujours été de considérer la partie de la Plaine des Roches, située entre le Pont Praslin et le 13me mille, comme incluse dans le district des Pamplemousses. La ligne de démarcration coupe la dite Plaine des Roches vers l'endroit déjà par lui indiqué, c'est-à-dire vers le 13me mille et ce n'est point la Rivière du Rempar qui la cotoie. Les déclarations pour les acte de l'Etat Civil ont toujours été faites au bureau de l'Etat Civil des Pamplemousses par les personnes résidant dans la partie de la Plaine des Roches qu'il vient de spécifier. Et c'est dans cette même localité que demeure le défendeur. Le Magistrat des Pamplemousses a toujours jugé que cette étendue de terrain était soumise à sa jurisdiction. La question est donc décidée en droit et par la coutume ; le tribuual est donc compétent.

La Cour ordonne une descente sur les lieux et ajourne son jugement à huitaine.

Voici le jugement rendu à cette nouvelle audience, par M. Autard de Bragard :

Dans cette cause, une exception a été soulevée

celle de la juridiction de cette Cour, en raison du lieu où résident les parties, c'est-à-dire qu'il est allégué par le Conseil du défendeur que la cause d'action a pris naissance sur la rive droite de la Rivière du Rempart immédiatement après le Pont Praslin à Flacq et que par conséquent le tribunal de Pamplemousses est incompétent.

Les conseils et le public savent de quelle importance est la solution de cette question.

En effet, il n'y a rien de plus sérieux qu'une question dont l'indécision est de nature à porter le désordre le plus grave dans les affaires ; rien de plus déplorable que l'incertitude sur les limites de deux juridictions voisines, incertitude qui peut vicier non seulement les actes faits par des particuliers, mais encore ceux émanant d'officiers ministériels qui n'ont qualité pour exercer leurs fonctions que dans certaines localités déterminées.

En présence d'une telle question, le Magistrat appelé à la décider, devait avant de se prononcer se rendre compte avec un soin minutieux de tous les détails qui servent à l'éclairer, afin de pouvoir juger en vraie connaissance de cause, et afin de ne pas manquer à cette prescription de la loi, qui, en matière civile, défend au juge de s'abstenir de rendre justice sous prétexte d'obscurité ou d'insuffisance de la loi.

A cet effet, aucunes peines n'ont été de sa part épargnées et ces peines ont, je dois le dire, été récompensées, en ce quelles lui ont, pour ainsi dire, donné l'occasion d'aborder la partie historique de notre pays, qu'elles l'ont ramené vers l'établissement même de la Colonie ; ensuite descendant pas à pas jusqu'à l'époque actuelle, il a parcouru les actes de la Compagnie des Indes, ceux du gouvernement du Roi de France, ceux de l'Assemblée Coloniale, et ensuite les actes publiés au nom de celui qui occupait l'Europe de son génie et de sa puissance. Je dois dire que chacun des actes de ces divers Gouvernement porte l'empreinte du caractère qui les distinguait. Nous y voyons d'abord surgir les embarras de la Compagnie, embarras trop naturels. Il s'agissait, en effet, de fonder l'Ile ; nous voyons ensuite graduellement l'ordre et la régularité se produire sous le Gouvernement du Roi et nous voyons l'autorité d'un chef qui représentait parmi nous un pouvoir absolu, s'imposer sous l'administration du Général Decaen. Enfin nous voyons sous l'administration de Sa Majesté Britannique, se manifester comme dans tous les pays qui relèvent de sa puissance, ce respect des mœurs, des habitudes, et des droits acquis, traits caractéristiques du Gouvernement sous lequel nous vivons aujourd'hui.

Après avoir consulté les régistres du Conseil Supérieur, *tous* nos recueils d'actes législatifs et administratifs, j'ai interrogé d'anciens habitants, des notaires qui ont fait des actes de leur ministère au quartier de Flacq à celui des Pamplemousses. J'ai enfin consulté des documents émanés du Gouvernement dans le Département qui était celui auquel on doit naturellement recourir quand il s'agit d'établir la géographie de l'Ile dans nos différents quartiers.

Le premier titre qui se rattache à la question qu'il s'agit de décider est un arrêté du Conseil Supérieur de Maurice, alors Ile de France, relativement à la Police de l'Ile : il est de l'année 1762. Il divise l'Ile, pour sa police intérieure en huit quartiers.

Voici ce document :

" L'Ile de France sera divisée en 8 principaux quartiers et il sera établi des Syndics dans chaque quartier, savoir :

" 1o. Le Port-Louis ou le Port N. O. dont les limites seront du côté de l'Est la Rivière des Lataniers et du côté de l'Ouest la Grand'-Rivière et le Ruisseau de l'Anse Courtois.

" 3o. Le Port Bourbon ou le Port du S. E. dont les limites seront d'un côté la Grand'Rivière du Grand Port.

" 3o. Le quartier des Pamplemousses qui contiendra *celui* de la Maison Blanche et *celui* de la Rivière et Plaines des Calebasses.

" 4o. Le quartier de la Montagne Longue qui contiendra *celui* de la Rivière du Tombeau et le quartier de la Rivière des Lataniers.

" 5o. Le quartier des Plaines Wilhems qui contiendra les habitations sises sur la Rivière Belle-Eau et celle de la Rivière Noire.

" 6o. Le quartier de Moka qui contiendra le Réduit, le quartier ou l'Ilot du Réduit et le quartier Militaire.

" 7o. Le quartier de la Rivière du Rempart.

" 8o. Et le quartier de Flacq dont les bornes seront la grand'rivière du Grand-Port."

Voilà le premier document que j'ai pu me procurer, le premier de ceux que nous possédons aujourd'hui, qui donne une division officielle de notre Colonie. Je ne parle pas des cartes, plans, et autres documents de cette nature ; je n'ai pu en consulter beaucoup

plus que ceux que nous avons tous sous la main et suivre avec plus de précision qu'à l'aide des arrêtés, les divisions qui peuvent avoir eu lieu.

Vient ensuite un arrêté du 11 Août 1768. Mais avant d'en venir aux détails de la question, il est nécessaire de recourir à deux arrêtés l'un de Janvier, l'autre de Février 1752, c'est-à-dire de dix années antérieurs pour faire voir qu'à cette époque un sieur Boudard avait été nommé arpenteur juré et admis à serment devant le Conseil supérieur à cet effet, afin de faire le mesurage des terrains qui avaient été concédés et de ceux à concéder. Il était question de réunir au domaine de la Compagnie un certain nombre de terrains qui avaient été abandonnés par des particuliers qui en avaient obtenu les concessions.

Je fais allusion à ces deux arrêtés parce qu'à cette époque c'est-à-dire un quart de siècle après l'occupation définitive de l'Ile, il y avait des désordres assez fréquents sur les questions de réclamations, pour obliger la Compagnie à faire arpenter les terrains concédés et non concédés. L'arrêté de Janvier 1752 prescrivait la manière de procéder à cet arpentage. "Le sieur Boudard, " y est il dit, procédera à son opération sans rien " changer aux *faces* ni *profondeurs* des conces- " sions, les réduisant toutefois suivant leurs faces " et profondeurs aux quantités qu'elles doivent " avoir. "

Je signale ici ces expressions *faces* et *profondeurs*, parce que, plus tard nous les retrouverons dans les divisions des quartiers, celui de Flacq en particulier, et nous verrons si nous devons en déduire une limite réelle pour ces quartiers. Nous avons donc là une première division établie par un réglement du Conseil supérieur pour la Police de la Colonie.

Plus tard, en 1768, sous le Gouvernement Royal une nouvelle division a lieu ; mais avant de passer à celle-ci je suis bien aise de revenir sur celle qui avait été adoptée par l'arrêté de 1762 du Conseil Supérieur.

Il statuait que : " l'Ile serait divisée en huit " *principaux* quartiers. Le quartier des Pam- " plemousses contiendra celui de la Maison " Blanche, de la Rivière et de la Plaine des " Calebasses." Il y avait donc déjà une division par quartier.

En 1752, dix ans auparavant, lorsqu'il s'agissait de la nomination d'un sieur Boudard et de la réunion au domaine de certaines concessions abandonnées, on trouve déjà les mots de *quartier* et de *cantons* employés. Est-il à supposer que depuis l'arrivée de M. de Nyon en 1722 jusqu'à l'arrêté de 1762, pendant un laps de 40 années, aucune division n'ait été établie ? Nous ne possédons aucune certitude à cet égard et nous sommes portés à croire qu'après l'occupation de l'Ile, il a été question d'abord de *concessions*; que les familles, en se répandant sur le sol, ont peu à peu introduit de certaines dénominations pour distinguer les parties du territoire qu'elles occupaient jusqu'à l'époque où, comme le dit l'arrêté de 1762, *pour la police* de l'Ile, le Conseil Supérieur a jugé nécessaire d'établir une division officielle de la Colonie.

Nous voyons dans ce document des limites bien vagues et nous remarquons surtout l'absence de la limite la plus naturelle la MER. C'est qu'alors soit à l'intérieur de l'Ile, soit sur le littoral, la Compagnie s'était réservée les terrains et les forêts connus sous le nom de *réserves*.

C'est vers 1767 que l'administration passa entièrement aux mains du roi de France. Il ne s'agissait plus alors de la Police intérieure du pays, comme à l'époque de l'arrêté du Conseil supérieur, mais de la défense de la Colonie, et le 1er Novembre 1768 intervint une nouvelle division de l'Ile en *onze* quartiers pour y établir des milices.

Nous allons passer en revue ces différents quartiers, et nous parcourrons pas à pas les différentes portions de notre pays, pour arriver à le constituer en entier.

Ordonnance du Roi du 1er Août 1768.

" Sa Majesté estimant nécessaire d'établir des Milices dans ses colonies des Iles de France et de Bourbon, etc., etc.

" A ordonné et ordonne :

. . . . . .

" Art. 6 La Colonie de l'Ile de France sera visée en 11 quartiers dans l'ordre qui suit, savoir :

" QUARTIER DE LA RIVIÈRE NOIRE :

" Ce quartier contiendra la Rivière, le Morne Brabant, y compris la Rive droite de la Rivière du Poste Jacotet, l'enfoncement du Tamarin, la plaine de Flicq en Flacq, les plaines St. Pierre et la Petite Rivière dite Belle Eau." (c'est c'est la 1re constitution de la Rivière Noire en quartier.)

" QUARTIER DES PLAINES-WILHEMS :

" Ce quartier embrassera les terrains qui sont sur la rive gauche de la Grand'Rivière, ceux qui sont bornés, par la Rivière de la Terre Rouge, jusqu'au balisage mitoyen des habitations des sieurs Déribes et de Laulne Longchamp, ceux qui sont sur la rive gauche de la rivière du Ménil, depuis la jonction avec celle des Plaines Wilhems en la remontant vers " La Mare aux Joncs," par la ligne Barin qui se termine aux lignes des réserves, y compris les terrains qui se trouvent à la droite de la dite ligne ; ceux des Vakoas, et ceux des deux rives de la Rivière du Rempart dite " Rivière du bassin des Forges," jusqu'aux chaines des Montagnes du Tamarin et des trois Mamelles." (Le quartier des Plaines Wilhems, on le voit, est étendu bien au delà des limites fixées dans l'arrêté de 1762, notre point de départ.— Je ferai remarquer en passant que les délimitations indiquées par les noms des habitations et des propriétaires est, en principe, mauvaise parce que ces noms sont trop sujets à changements ; mais il ne faut pas oublier qu'en 1762, M. Boudard, avait été nommé Arpenteur juré et qu'il y avait alors une carte des concessions dans l'Ile, où tout était précisé avec soin et chaque changement annoté. Ce sont là des remarques dont l'utilité se fera mieux sentir quand je parlerai du rapport du Surveyeur Général en l'année 1858.)

" QUARTIER DE LA TERRE ROUGE.

" Ce quartier sera composé des terrains qui commencent au balisage mitoyen des habitations des sieurs Déribes et de Laulne Longchamps, et comprendra d'un côté, ceux qui sont sur la rive droite de la rivière du Ménil, en remontant cette rivière vers la Mare aux Joncs par la ligne Barin qui se termine aux réserves comme aussi les terrains sur lesquels sont les sources de la rivière de la Chaux, et de l'autre côté en traversant la rivière de la Terre Rouge, et en la descendant jusqu'à sa jonction avec celle de la Cascade, il renfermera tous les terrains qui se trouvent remonter cette rivière à sa rive gauche jusqu'à la ligne qui sépare ce quartier de celui de Moka ; les terrains adjacents au piton du milieu de l'Ile, et ceux sur lesquels passe la chaîne des Montagnes la Selle."

" QUARTIER DE MOKA.

" Ce quartier contiendra les terrains qui se trouvent bornés par la rive droite de la Rivière de la Cascade, ceux qui se trouvent sur la Rivière de Moka et celle de la Grand'Rivière d'un côté et de l'autre ; ceux qui se trouvent bornés par les montagnes de Moka et tous les terrains qui sont sur les deux rives de la *Rivière Françoise*, composant ci-devant le *Quartier Militaire.*"

(Je fais remarquer dès à présent que Moka et Pamplemousses sont limitrophes).

" QUARTIER DU PORT LOUIS.

" Ce quartier sera borné par l'embouchure de la Grand' Rivière d'un côté et de l'autre par les terrains qui sont sur la rive gauche de la " Rivière Sèche." (C'est par là que Pamplemousses et Port-Louis sont encore limithrophes.)

" QUARTIER DE LA MONTAGNE LONGUE.

" Ce quartier comprendra, d'un côté la rive droite de la Rivière Sèche et de l'autre la rive gauche de la rivière des Pamplemousses, et en remontant jusqu'au balisage mitoyen des habitations des Sieurs Raoux et Ténèbre, comprendra les terrains qui sont sur les deux rives de la Rivière de Piterboth jusque dans le cercle des montagnes formées par la chaine de la Montagne Longue, celle des deux Mamelles et le morne de la Rivière des Calebasses."

" QUARTIER DES PAMPLEMOUSSES.

" Ce quartier comprendra la " Maison Blanche" qui se trouve terminée par la rive droite du ruisseau des Pamplemousses et en remontant, jusqu'au balisage mitoyen des habitations des Sieurs Raoux et Ténèbre, les terrains qui sont sur la droite de la Rivière des Calebasses, qui sont terminés par le balisage de la Villebague, ceux des deux rives de la Rivière des Pamplemousses et ceux bornés par les terrains du Sieur de Rhune en tirant vers la butte des Papayers."

" QUARTIER DE LA RIVIÈRE BASSE DU REMPART.

" Ce quartier contiendra les terrains qui se trouvent d'un bord et de l'autre du Piton de la première découverte, (*Mont Piton*) ceux de la Poudre d'Or et des deux rives de la Rivière du Rempart, et remonte la dite Rivière, jusqu'aux habitations des enfants du feu Sieur Lejuge, et en traversant la rivière, jusqu'au balisage des terrains de la Villebague."

(C'est le 3me quartier limitrophe des Pamplemousses et la limite qui vient d'être fixée démontre que le terrain après le Pont Praslin n'était pas compris dans le quartier de la Rivière basse du Rempart.)

QUARTIER DES CALLEBASSES.

" Ce quartier contiendra les terrains de la Villebague, ceux qui sont, en remontant la Rivière du Rempart, depuis et compris les habitations des enfants de feu Sieur Lejuge, *jusqu'aux sources de la dite rivière* ; ceux qui sont sur la rive gauche de la Rivière des Calebasses et les *terrain de la Nouvelle Découverte.* "

(C'est par là que Pamplemousses arrive jusqu'au plateau de MOKA.)

QUARTIER DE FLACQ.

" Ce quartier contiendra d'un côté les terrains qui se trouvent bornés par les *profondeurs* de la Rivière du Rempart, ayant leur *face* sur le Ruisseau " Grande Barbe " et la Rivière Françoise et de l'autre par les terrains ayant *face* sur la rive droite de la " Rivière Sèche " bornés par les rives gauches des " Rivière Profonde " et " Grand'Rivière."

(Ici se retrouvent les mots de *profondeur* et de *face* que j'ai signalés dans l'arrêté de janvier 1762 ; et il ressort de la manière dont ils sont employés pour limiter Flacq, que le quartier ne comprend pas ces *profondeurs*, et c'est ainsi que l'entendent les arpenteurs que j'ai consultés.)

QUARTIER DU PORT BOURBON.

" Ce quartier comprendra le terrain qui prend depuis la rive droite de la " Rivière Profonde " formant les " Trois Ilots " et les terrains qui sont dans le haut de cette même " Grande Rivière " sur la même rive droite, bornés par la ligne de *profondeur* des habitations sur lesquelles sont les montagnes de " la Selle " et les terrains concédés tant sur la Rivières des Créoles que sur la Rivière de " la Chaux."

Tel est l'Arrêté de 1768 qui est la base fondamentale de la division territoriale du pays.

Cinq ans plus tard une nouvelle division a lieu ; c'est par l'arrêté de 1773 ainsi conçu :

" Sa Majesté s'étant fait représenter son ordonnance du 1er Août 1768, concernant l'Etablissement des Milices aux Iles de France et Bourbon, et ayant jugé nécessaire de réduire le nombre des quartiers de la première de ces Iles a ordonné et ordonne ce qui suit :

" Art. 1er. L'Ile de France sera à l'avenir divisé en *huit* quartiers seulement au lieu de *onze* qui avaient été fixés par l'article VI de l'arrêté du 1er Août 1768 dans l'ordre qui suit: Le quartier de Port-Louis, celui du Port Bourbon, ou Port Sud-Est, celui de Flacq, celui de la Rivière Basse du Rempart ou de la Poudre d'Or, celui des Pamplemousses, celui des Plaines Wilhems et celui de Moka."

Art. 2. Les quartier des Calebasses et de la Montagne Longue seront et demeureront en conséquence réunis à celui des Pamplemousses, pour ne former qu'un seul et même quartier, sous la dénomination de quartier des Pamplemousses, *en suivant les limites* désignées par l'article VI de l'Ordonnance du 1er Août 1768."

" Art. 3. Le quartier de la Terre Rouge sera et demeurera réuni à celui de Moka, pour ne former à l'avenir qu'un seul et même quartier, sous le nom de quartier de Moka, qui comprendra les terrains assignés à ces deux quartiers par l'article de l'Ordonnance du 1er Août 1768."

" Art. 4. A l'égard des quartiers de Port-Louis, du Port Bourbon, de Flacq, de la Rivière du Noire, de la Rivière du Rempart et des Plaines Wilhems, ils continueront d'exister sur le même pied que par le passé."

Tel était l'état de choses en 1789. Survint la Révolution; et l'Assemblée Coloniale, par son Arrêté du 2 avril 1791, divisa la colonie en Municipalités. Cette division ne fut pas de longue durée. A peine débarqué à l'Ile de France, le capitaine général Decaen promulgua l'arrêté suivant : (9 vendémiaire an XII.) " La division " militaire et civile des Iles de France, de la " Réunion et dépendances, est rétablie provisoi- " rement par quartiers, telle qu'elle était en " 1789 ; cependant, à l'Ile de France le canton " connu sous le nom de *Savane* formera un " nouveau quartier."

Je crois devoir faire remarquer de nouveau que chacun des documents que j'ai lus porte avec lui le cachet de celui dont il émane. L'arrêté du général Decaen porte l'empreinte du caractère résolu du chef qui alors gouvernait la France. D'un trait de plume, on dirait d'un coup de sabre, la Révolution est supprimée. Cependant un fait nouveau se produit. Un canton presqu'inconnu, celui de la Savane, formera dorénavant un quartier. C'est l'entrée de ce district, aujourd'hui l'un des plus beaux et des plus florissants de l'île, dans la famille des grandes divisions de la colonie.

Les divisions décrétées par le général Decaen subsistent encore de nos jours, sans toutefois que les limites de chacun des quartiers soient restées les mêmes.

J'ai été obligé d'examiner aussi longuement

la question qui nous occupe parce qu'elle a été déjà présentée sous d'autres formes et qu'elle a donné lieu à bien des difficultés qu'il est devenu indispensable de résoudre.

Sous le gouvernement du général Decaen, il avait fallu intervenir entre la Rivière du Rempart et Pamplemousses. A l'époque du recensement décennal de 1861, il m'avait fallu faire décider administrativement sur les limites entre Flacq et Pamplemousses. Je cite l'arrêté du 14 fructidor an XII du général Decaen :

" Vu les représentations faites par les capi-
" taines commandants des quartiers des Pam-
" plemousses et de la Rivière du Rempart, que
" les limites respectives entre ces deux quar-
" tiers, n'étant pas déterminées d'une manière
" positive, l'incertitude de savoir si telle habi-
" tation était dépendante de l'un ou de l'autre
" quartier avait fait naître diverses réclama-
" tions qui se renouvelleraient sans doute si les
" choses restaient plus longtemps dans cet état,
" après en avoir délibéré avec le Préfet colo-
" nial et le Commissaire de justice arrête :

" Art. 1er. Le quartier de la Rivière du
" Rempart et des Pamplemousses sont défini-
" tivement et irrévocablement fixés ainsi qu'il
" suit :

" La ligne de démarcation des deux quartiers commencera à la plus haute source de la Rivière du Rempart au point d'embranchement de la Montagne du Rempart avec celle des Calebasses. Elle suivra la Rivière jusqu'au Pont Praslin ; de là se rendra directement au Mât des Signaux du Piton de la Découverte, ira joindre l'angle le plus Sud de la concession Senneville, longera le balisage entre cette concession et celle Derhune, redescendra le balisage qui sépare les concessions Senneville et Latour St.-Ygest, pour reprendre celui qui sépare cette dernière des concessions Larochе fils et Collard aîné jusqu'à sa rencontre avec le balisage des réserves, vis à vis la case des gardiens : elle longera ce dernier balisage jusqu'à sa rencontre avec le grand chemin du Mapou, qu'elle suivra jusqu'à son embranchement avec un chemin de charrois qui se dirige à gauche et conduit à l'avenue de l'Etablissement aujourd'hui Courbon. Elle contournera l'établtsement toujours avec le même chemin qui reprend l'avenue opposée à la première et qui se termine par un chemin de charrois qui descend directement au milieu de l'anse de La Raie, où elle viendra s'appuyer, en laissant par conséquent la Mare dite aux Mulets et la Butte aux Sables, à peu de distance sur la gauche.

" Toutes les habitations qui seront traversées par cette ligne, appartiendront à l'un ou à l'autre des deux quartiers suivant que les Etablissements qui en font partie seront de l'un ou de l'autre côté de la ligne."

La séparation aux sources de la Rivière du Rempart et au Pont Praslin est ici bien tranchée. Elle a lieu entre Pamplemousses et la Rivière du Rempart, et non entre Pamplemousses et Flacq. Depuis l'origine de la Rivière du Rempart, d'un côté (rive droite) l'arrêté place le quartier de la Rivière du Rempart, et de l'autre (rive gauche) celui des Pamplemousses.

Cet arrêté ainsi qu'un autre arrêté de la même date (14 fructidor an XII) réunit le canton des Trois Ilots au quartier de Flacq et fixe seulement les limites entre Flacq et le Port Sud Est, en s'appuyant sur ce considérant : "Que " les limites des différents quartiers doivent " être, autant que possible, déterminées par les " accidents naturels du terrain, qui peuvent " servir à les asseoir invariablement, et que " ceux offerts par la direction des montagnes " sont les plus propres à remplir cet objet."

Sept années après, la Colonie passait sous la puissance de l'Angleterre.

Examinons ce qui s'est fait depuis lors.

J'ai déjà dit que l'Angleterre nous avait appliqué cette pratique d'une sage politique qui consiste à respecter les usages, les mœurs, les lois d'un pays passé sous sa domination, à ne pas le pousser par la violence, dans la voie des réformes, mais à se l'assimiler d'une manière lente, progressive et libérale.

Le premier acte du Gouvernement britannique relativement à la question dont il s'agit, est de 1843, c'est d'environ 35 ans postérieur à la conquête de l'île.

Une ordonnance locale (No. 11 de 1834) fractionnait l'Ile pour la mise à exécution de l'acte d'abolition de l'Esclavage et la nomination de Juges spéciaux. Elle ne reçut pas la sanction de la Métropole.

Celle No. 1 de 1835 eut le même sort. C'est donc seulement pour mémoire que j'en parle.

En 1840 une autre ordonnance (No. 12), fut passée pour établir, en principe, la division des Pamplemousses en deux quartiers. Elle fut désapprouvée ; mais en 1843 la division eut lieu et l'Ordonnance No. 17 créa le quartier des "Pamplemousses Nord" et celui des "Pamplemousses Sud," qui subsistèrent jus-

qu'à la création des Magistratures de district. Il est bon de citer cette dernière ordonnance :

" Attendu qu'il est devenu nécessaire, en raison de l'augmentation considérable de la population et de la culture, dans le quartier des Pamplemousses, et pour les avantages des habitants dans leurs rapports avec les autorités locales de ce district, de la diviser en deux quartiers distincts.

" Son Excellence le Gouverneur en conseil a ordonné et ordonne :

" Art 1er. Le quartier des Pamplemousses " sera divisé en 2 quartiers qui seront respecti- " vement appelés Pamplemousses Nord, et " Pamplemousses Sud."

" Art. 2. Les limites des deux quartiers sont fixées ainsi qu'il suit : Le quartier Nord sera borné au nord ouest par la mer, depuis la Pointe aux Piments, près de la Baie aux Tortues jusqu'à la pointe de la Butte aux Sables entre le Cap Malheureux et l'Ile d'Ambre ; à l'Est par la limite *naturelle* du district de la Rivière du Rempart jusqu'au canal du Bois Rouge, et au sud par le dit canal depuis l'Etablissement appelé " Bon Espoir " jusqu'à la Pointe aux Piments,

" Art. 3. Les limites pourront être changées ou modifiées par proclamation de Son Excellence le Gouverneur autant qu'il sera jugé nécessaire pour la convenance du public.

" Art. 4 Toute portion de la Rivière du Rempart dont la réunion à l'un des quartiers susdits serait jugée convenable pourra de la même manière être ajoutée par proclamation de Son Excellence le Gouverneur."

Dire qu'une limite sera la *Pointe aux Piments* près la *Baie aux Tortues*, c'est encore laisser bien de l'incertitude sur le point précis de cette limite ; et le canal du Bois Rouge s'arrêtant à "Bon Espoir," dire que ce canal sera la limite jusqu'à la Pointe aux Piments, c'était en réalité ne fixer aucune limite. Des Pamplemousses sud il n'est rien dit : ses limites restaient donc, sauf sa séparation d'avec les Pamplemousses nord, telles qu'elles se trouvent déterminées par l'arrêté de 1773, et l'arrêté du Général Decaën.

En 1851 furent constituées les Magistratures de District, tribunaux de 1re instance au petit pied l'on peut dire, placés dans chaque district à la portée des Justiciables. Il était naturel que le Gouvernement, qui établissait de telles Cours de Justice établît en même temps les limites de leur juridiction respective, afin qu'elles pussent fonctionner régulièrement, et que les justiciables, sussent exactement à quelle autorité ils avaient à s'adresser.

Malheureusement l'ordonnance de 1851, promulguée à cet effet, se borne à changer les divisions territoriales de certains districts.

Dans l'article 1er, Moka et Plaines Wilhems sont réunis. Ils ont depuis été séparés, comme chacun le sait.

L'article 2, concernant la Rivière du Rempart et les Pamplemousses Sud et modifiant leur division, est ainsi conçu :

" Les Districts de la Rivière du Rempart " avec ceux des Pamplemousses Nord et Sud " formeront deux districts, c'est-à-dire :

" Le District de la Rivière du Rempart qui " sera borné comme suit : du côté Nord au " Nord Est par la mer ; au Sud par le District " de Flacq et du côté de l'Ouest par le chemin " qui conduit de la Grand Baie à Flacq, en tra- " versant les habitations dites *Vale, Union, Ca- " roline, Labourdonnais, Beau Séjour, Amitié* " et *Piat* jusqu'au point de section du dit che- " min, avec la limite qui existe entre le district " de la Rivière du Rempart et celui de Flacq"

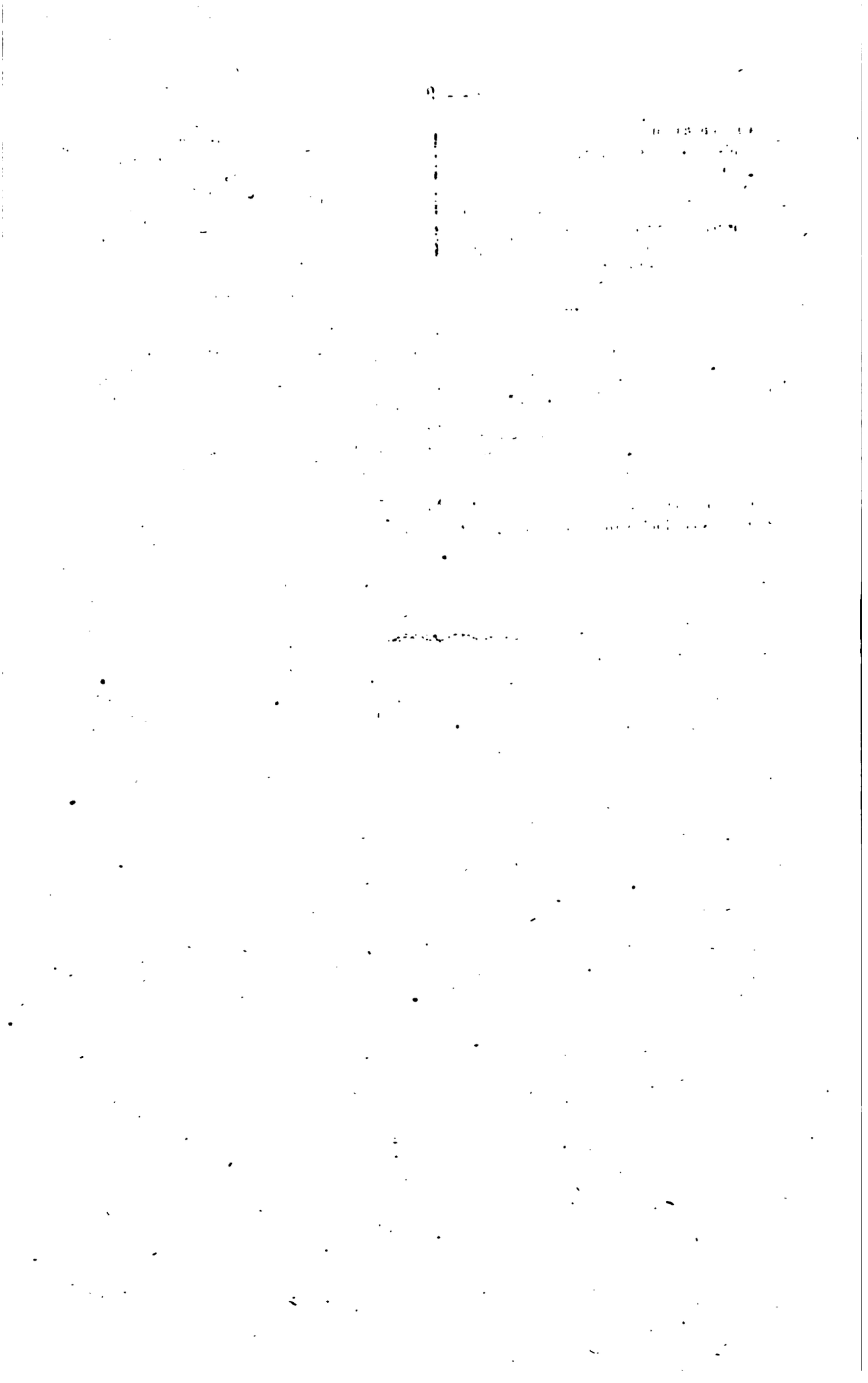
" Et le district des Pamplemousses, qui sera " borné à l'Est par le nouveau district de la Ri- " vière du Rempart ; au Sud par le District de " Moka; au Sud-Ouest par la limite Municipale " de Port-Louis; et à l'Ouest par la mer."

Par l'Article 3 le Gouverneur est autorisé à modifier ces limites et celles de tous les autres districts toutes les fois qu'il le jugera nécessaire.

Ni cette ordonnance, (la chose est remarquable) ni les arrêtés ou ordonnances que nous avons passés en revue de 1762, 1768, 1772, de Fructidor, An XII et de 1843 n'indiquent une ligne commune entre Flacq et Pamplemousses. D'après ces mêmes documents, il ne peut y avoir de commun entre eux, qu'un point : Celui d'où partent les limites respectives de Flacq, de la Rivière du Rempart, des Pamplemousses et de Moka.

Depuis l'Ordonnance No. 13 de 1851, on est parfaitement fixé sur les limites des Pamplemousses et de la Rivière du Rempart à partir de la Grand'Baie jusqu'à l'habitation Piat dans la Plaine des Roches. C'est une route royale continue sur laquelle il n'y a point d'erreur possible.

Mais quoique cette ordonnance assigne com



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